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THE LAW OF PUBLIC MEETING[1]

THE PROBLEM

THE fundamental principle of the British Constitution is that of democracy. Freedom of association, as well as freedom of speech are essential to democracy. The various extensions of the franchise have secured that the people may make their free choice by election protected by the provisions of the Ballot Act, 1872, and the legislation against corrupt and illegal practices. The law of public meetings deals with the legal aspect of public expression of opinion by the spoken word and by demonstration. Its object is primarily to prevent and to punish outbreaks of disorder. For this reason Dicey based his argument upon the assumption that all meetings were lawful unless the misdemeanour of unlawful assembly was committed by the participants. This article which attempts to deal in outline with the powers of the police to control meetings and processions shows that the offence of unlawful assembly plays only a small part in the potential control over public expression of opinion which can be exercised by the Administration. A distinction may be drawn at the outset between liberty to express opinions, political or otherwise, and the liberty which the law affords as to choice of time and place. The present article deals with the latter aspect of freedom of speech.

Liberty of speech is conditioned, as a matter of private law,

[1] This article is based upon a lecture delivered at King's College, London, in January, 1938.

by the law of libel and slander, irrespective of the place of utterance. Substantially this is true also of the limitations imposed upon speakers by the criminal law of blasphemy, obscenity and even sedition. But public law—for such undoubtedly is that part of criminal law which relates to offences against the State and public order generally, whatever may be said about offences against individual persons and their property—without denying liberty of speech as such, is concerned to restrict the mode of its exercise in public places on several grounds. Speakers in the past have been prosecuted for riot and kindred offences, of which unlawful assembly has been the most fruitful of judicial decisions, and, it so happens, of obscurity as to the state of the law. To-day with the recognition that it is the function of the police to prevent as well as to secure punishment for offences, clashes between the police and speakers at public meetings more often result in (i) applications to magistrates to bind over speakers suspected of likelihood of causing breaches of the peace under the old jurisdiction which dates from a fourteenth century statute and perhaps is inherent in the commission of the peace—*Lansbury* v. *Riley*[2]; (ii) charges of obstructing the police in the execution of their duty under the Prevention of Crimes Acts, 1871 and 1885; or most frequently (iii) charges of insulting words or behaviour or of assault.

But whatever be the technique of legal administration it will be admitted that the law is not entirely clear. This is an inherent defect in the methods of our common law. That it can be cured, given sufficient measure of public agreement, is shown by the enactment of the Public Order Act, 1936, though that every public ill can be cured by legislation is a proposition to which assent should not be too readily given. Before then considering the law it is well to inquire as to what are the prospects of sufficient agreement as to the right attitude of a democratic State towards free expression of opinion by means of public speeches and demonstrations. A Government of the United Kingdom in the mid-twentieth century is sufficiently alive to the necessity of listening to protests against public evils without the protestants having to resort to force to secure their ends. It is true that it is only a quarter of a century ago that the suffragette movement demonstrated against the Government with a show of violence. Nor can the problems of the Governments in India, or the Administrations of Palestine and some of the Colonies be overlooked. But if in the present conditions in England a Government can afford to allow the armoury of legal weapons which are available

[2] [1914] 3 K.B. 229.

to interfere with demonstrations against its policy to rust and decay, so far as concerns the safety of Ministers and public buildings, it remains true that the inhabitants of localities are still liable to suffer grave inconvenience from the enthusiasm of agitators. In other words the problem of control of public speech is one which ought to be approached from the point of view of the private citizen and his need for protection, rather than of the safety of the State and its officers.

The problem of maintaining order in Bermondsey seems on this view to differ fundamentally from that of the disorders which broke out in the earlier part of the nineteenth century. For it is no longer the Government which as a whole needs to protect itself and its rich supporters from violence; it is householders and their families, chiefly in poorer districts, who look to the Government, i.e. to the police, to protect them on occasions such as fascist and communist demonstrations, and to a minor extent at general elections. From certain public utterances of the present Home Secretary one may be assured that he at least is alive to the private nuisance aspect of unlicensed liberty to speak and demonstrate in public to the annoyance of one's neighbours. And it is a view which the metropolitan magistrates can confirm.

Accepting the belief that meetings and processions serve an essential purpose and have their value as characteristics of democracy, to what extent ought the law and its administrators to exercise power to curb these demonstrations? The law should be clarified and relieved of obsolescent statutes of the eighteenth and early nineteenth centuries which were passed to meet emergencies of a different character and administered by Government officers before the days of the modern police. Few would regret the repeal (or advocate the re-enactment, as the case may be) of the Seditious Meetings Act, 1817 (one section of which survives), or any of the Six Acts.

But however much the law is clarified, the problem of its administration remains. There will always be over-zealous police officers, whose suspicions and beliefs as to the probability of breaches of the peace will result in proceedings in courts of summary jurisdiction, if not in actual force being employed by the police against demonstrators who do not actually intend to disturb the peace, but are advocates of an unpopular cause. There is no need to accept all the criticisms which have been directed against the police of recent years. That a few deplorable incidents have occurred may be conceded. But in this connection there may be detected a tendency on the part of authority to deal more harshly with counter-demonstrations than with promoters of meetings

which provoke such a form of opposition. This is sometimes construed as favouring the Right Wing against at all events the Extreme Left. But it is submitted that the real explanation is that supporters of the Extreme Left, if only because of lack of funds to organise meetings and to advertise are more often found in counter-demonstrations than as conveners of the meetings which cause them to assemble. It was stated in the House of Commons by the Under Secretary of State for the Home Office in December, 1937, that in a period of five months at twenty meetings the promoters were asked to close down because of the attitude of the crowd—thirteen of these were fascist meetings. If this be so, the action of the police in (shall we say) favouring the meeting first in the field is not merely excusable, but strictly in accordance with their duty to preserve order at a meeting lawfully assembled; Tindal, C.J., *Charge to the Bristol Grand Jury*,[3] *R.* v. *Pinney*[4]. Moreover the appeal to reason which freedom of speech should secure is defeated if the appeal is made inaudible by demonstrations.

Now that *Thomas* v. *Sawkins*[5] secures to the police admission as of right to all meetings open to the public, it should be easier to avoid a repetition outside the place of assembly of such scenes as took place on the occasion of the notorious Olympia meeting of the British Union of Fascists a few years ago.

But what is the policy which ought to influence the law and its administration? Can we strike a happy mean, which, while freely allowing expression of all points of view in public, nevertheless permits authority to prevent disorder in the neighbourhood? Ought liberty of speech to include licence to provoke opposition to the point of disorder? It may be that until we have learned a greater measure of toleration—and great improvement has been achieved in this direction in the past century and more—no solution is practicable. Something could be done by affording fuller facilities for the free use of public buildings to all political organisations, such as is at present granted by the law at election times to candidates. This would have the effect of checking the desire for marches of impecunious demonstrators which so seldom achieve their purpose, and which so frequently embarrass the reasonable use of the highway by the inhabitants of districts which they frequent. If public opinion will not tolerate the total banning of street meetings and processions by the police, such as has been enforced under statutory powers in certain

[3] (1832), 5 C. and P. 261.
[4] (1832), B. and Ad. 947.
[5] [1935] 2 K.B. 249.

districts of London for many months, it must seek to reduce the causes which lead not infrequently in certain quarters to disorder.

The Present State of the Law

Dicey contributed a long note[6] to his chapter on the Right of Public Meetings.

> "Four important questions connected with the right of public meetings require consideration. These inquiries are—
>
> "First: Whether there exists any general right of meeting in public places?
>
> "Secondly: What is the meaning of the term 'unlawful assembly'?
>
> "Thirdly: What are the rights of the Crown or its servants in dealing with an unlawful assembly? and
>
> "Fourthly: What are the rights possessed by the members of a lawful assembly when the meeting is interfered with or dispersed by force?"

In 1938 our task must differ somewhat from that undertaken by Dicey. The first question has recently been answered comprehensively by Professor Goodhart in an article[7] which also discusses the kindred matter of processions, apart from the restrictions now imposed by the Public Order Act, 1936.

The second question is now of less importance, for recent practice shows that the police no longer prosecute for unlawful assembly the promoters of meetings or processions as opposed to participants in disturbances caused by strikes and lock-outs.

Thirdly, Dicey speaks of the rights of the Crown and its servants in dealing with an unlawful assembly. The general issue, namely, the rights of the police to deal with meetings and processions is the crucial one to-day.

The fourth question, What are the rights possessed by the members of a lawful assembly when the meeting is interfered with or dispersed by force?—is still important.

There is another question,[8] namely, Does there exist any general right of admission to meetings held on private property, such as premises hired for the occasion, so far as meetings advertised as open to the public are concerned? This is the point raised by *Thomas* v. *Sawkins*.

1. Does there exist any general right of meeting in public places?

[6] *Law of the Constitution*, (8th ed., 1908), Appendix, Note V.
[7] *Cambridge Law Journal*, 1937, Vol. VI, 2, "Public Meetings and Processions."
[8] See A. L. Goodhart, "*Thomas* v. *Sawkins* A Constitutional Innovation." *Cambridge Law Journal*, 1936, Vol. VI, 1.

Professor Goodhart attributed the uncertainty of the law to two causes—the limited number of reported cases and the over-simplification in certain text-books. There is a third contributory cause of uncertainty in the fact that the greater part of the cases which are reported start in magistrates' courts as prosecutions for insulting language or behaviour, assault or obstruction of the police in the execution of their duty. Such cases can go no higher than the Divisional Court. It is only by civil proceedings that the issue can be clarified by the Court of Appeal and so far no opportunity has arisen for enabling that tribunal to consider the question. Professor Goodhart's theme is that the legal principles governing public meetings and public processions should be distinguished. He points out that *Beatty* v. *Gillbanks*[8a] was a case of a public procession, not of a public meeting.

The starting-point of every discussion on this topic must be the law relating to user of the highway and it is clear that, in the absence of special licence from the appropriate owner of the highway, no person can claim that he and his fellow-men in unison can exercise their right of passing and repassing along the highway by standing still and making a speech or listening to speeches as the case may be. It is an offence to obstruct the passage of any footway or other highway; Highways Act, 1835, s. 72. Nor is it any defence to show that the obstruction only affected part of the highway and left clear a way of passage[9]. Nor need the obstruction so caused necessarily amount to a nuisance at common law. The public are trespassing upon the highway in so far as they do more than "pass and repass at their pleasure for the purpose of legitimate travel" including reasonable rest and recreation by the wayside; *Harrison* v. *Duke of Rutland*[11]: *Hickman* v. *Maisey*.[10]

Against whom is the trespass committed? The answer to this is in urban areas the highway authority in which the surface of the highway is vested. The term "highway" includes squares and other open spaces repairable by the local authority. But it is obvious that civil proceedings are of little use to check the holding of meetings unless these are duly advertised in advance. The question whether the local highway authority can ask the police to prevent the meeting is answered by the Highways Act. In any case a meeting usually constitutes a public nuisance—by reason of the obstruction which can be shown to have been caused—remediable by indictment or under local by-laws by summary

[8a] [1882] 9 Q.B.D. 308

[9] *Homer* v. *Cadman* (1886), 16 Cox 420; and see Jennings: *The Law and the Constitution* (2nd ed., 1938), p. 253.

[10] [1893] 1 Q.B. 142.

[11] [1900] 1 Q.B. 752.

proceedings. Professor Goodhart's conclusions are that every unlicensed public meeting can be regarded as a trespass against the person or body in whom the surface of the highway is vested, since the highway can only be used for the purpose for which it has been dedicated. Any other unlicensed use, however desirable it may be from other standpoints, is legally wrongful. If the highway is used for any purpose other than travel, a trespass may be committed, even though no one is obstructed and no injury done, but that trespass is only against the local highway authority and the owner of adjoining land, and is no wrong against the members of the public. So far as they are concerned the matter is only a wrong if it constitutes a public nuisance or an obstruction under the Highways Act, 1835. The few English cases on this subject are collected in Professor Goodhart's article.

There is, however, an interesting case from over the border which seems to have escaped most English writers in *M'Ara* v. *Magistrates of Edinburgh*.[12] A proclamation had been issued by the magistrates prohibiting the holding of meetings in certain Edinburgh streets unless a license to do so had been previously obtained. Penalties were imposed for breach of the proclamation which purported to be issued under powers conferred by an Act of 1606, which had for its object the staying of unlawful conventions. A street orator, who had been convicted for a breach of the proclamation, brought an action for declarator on the ground (*inter alia*) that the magistrates had no authority to issue the proclamation and that he was not bound to obey it. The court held that the Act of 1606 was in desuetude and further that the magistrates were not empowered at common law or by any other statute to issue such a proclamation and consequently set aside the conviction. The orator was acquitted on a second charge of a breach of the peace. The case is a good example of the Scots law doctrine of desuetude, which is unknown to our law. Its interest for us lies in the argument that the magistrates have a general power of preventing misuse of the streets and of prohibiting their use, though not by proclamation, for any but purely public purposes. The Lord President at p. 1073 says, "There is no such thing as a right for the public to hold meetings as such in the streets." In this respect then the law of Scotland does not differ from that of England. He goes on to discuss the right of passage and says that it is a question of degree what more the public can do in the streets besides passing and repassing. The right of free speech is a perfectly separate thing from the question of where that right is to be exercised. The Lord President declined

[12] [1913] S.C. 1059.

to generalise as to whether free speech can be exercised in open places and public places, but, as regards the streets, he is clear that the magistrates are the judges and not the police, though the police are the ministerial officers for executing the magistrates' decisions and moving on members of the public who choose to assemble in defiance of the magistrates.

Another Scottish case of interest is *Aldred* v. *Miller*[13] which follows M'Ara's case in denying any private right to an individual to make use of any public streets for holding public meetings, and goes on to say that, if a public meeting is so held, the court must pay due regard to the equal participation of all members of the public in the various uses for which the streets are kept open, of which free and unrestricted passage is the most important, but not necessarily the only use. In the case in question there was clear evidence of obstruction contrary to the express terms of a local Police Act in Glasgow.

In discussing public processions, Professor Goodhart regards a procession, as distinct from a meeting, as *prima facie* lawful; though even in the case of a procession the right is not an absolute one and depends upon the facts of each particular case as to whether the highway is being used in a reasonable manner. His distinction rests upon this basis—that a procession is passing and repassing, which is an admitted right of members of the public, whereas a meeting is necessarily stationary and therefore constitutes a trespass.

The two Scottish cases cited above apply equally to processions as to meetings and emphasise that a person must not selfishly engross a public right for himself. If therefore obstruction is proved as a fact, a procession constitutes infringement of the law just as much as a meeting. The English case of *Burden* v. *Rigler*[14] shows that a meeting is not necessarily unlawful because it is held upon a highway, but it certainly does not establish any right to meet there.

The position with regard to the police seems to be that, if they can prove that any obstruction is caused, they can prosecute under the Highways Act or similar statutory powers, or indict for public nuisance the promoters of and participants in any public meeting and equally so with a procession held upon the highway. Thus the right is reduced to this: any person may hold a public meeting if he has obtained beforehand the assurance of the local chief officer of police that he will not take proceedings against him on the ground of obstruction. Even so, any member of the public

[13] [1924] S.C. (J.) 117.
[14] [1911] 1 K.B. 337.

who is inconvenienced in his use of the highway can presumably take proceedings on his own.

But the recent case of *Duncan* v. *Jones*[15] goes further and seems to show that, even if no obstruction can be established and no trespass be in issue, the police may, on the ground that there is a reasonable apprehension of a breach of the peace by B, C and D if A makes a speech, prevent A from addressing a meeting at which B, C and D are present. This admittedly raises a problem of general application—can A be prevented from performing a lawful act because it is apprehended that B may thereupon commit an unlawful act? But it affects fundamentally the particular question of whether there can be any meeting at all without police licence.

The appellant Duncan, a woman speaker, was told by Jones, an inspector of police, who was present at the proposed place of meeting, that she could not hold a meeting there in N. Street, but could hold it at D. Street, 175 yards away. She thereupon mounted a box saying, "I am going to hold it," was taken into custody without resistance on her part and later charged with and convicted of obstructing the police officer in the execution of his duty. Mrs. Duncan had held a meeting some fourteen months previously at the same spot which was opposite a training centre for the unemployed. The previous meeting had been followed on the same day by a disturbance inside the training centre which the superintendent of the centre attributed to the meeting. In the intervening months Mrs. Duncan had made several attempts to hold other meetings at the same spot. It was not, however, alleged that on this occasion she caused an obstruction or that she or any of the persons at the meeting had either committed, incited or provoked any breach of the peace. The appeal to quarter sessions was dismissed and a case was stated to the divisional court as to whether there was evidence on which quarter sessions could form the opinion upon which the conviction of obstructing the police officer in the execution of his duty could be upheld. Quarter sessions had found:

> (1) that in fact (if it be material) the appellant must have known of the probable consequences of her holding the meeting —namely, a disturbance and possibly a breach of the peace— and was not unwilling that such consequences should ensue;
>
> (2) that in fact the respondent reasonably apprehended a breach of the peace;
>
> (3) that in law it thereupon became his duty to prevent the holding of the meeting; and

[15] [1936] 2 K.B. 218.

(4) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty.

Now the point at issue was whether the police inspector had any duty to prevent the meeting. If he had no such duty, he could not complain of being obstructed in doing that which it was not his duty to do, and he is in the same position as the over zealous policeman whose action was disapproved in *Beatty* v. *Gillbanks*, when he arrested the Salvationists because he feared unlawful opposition from another body. No breach of the peace, actual or contemplated as occurring by reason of the present meeting, was in question. Indeed the police suggested a place near by for holding the meeting. What was feared was a repetition of a disturbance inside the training centre, such as had followed the appellant's meeting held outside fourteen months earlier. The police inspector based his fears upon the opinion of the official in charge of the centre, whose apprehensions would certainly have been material, had the case been one involving a charge of unlawful assembly. But no such charge was in issue, though presumably it would have been brought, had there been any grounds for so doing. It is true that it was found as a fact that the appellant must have known of the probable consequences of her holding the meeting, namely, a disturbance, and possibly a breach of the peace, and *was not unwilling* (*sic*) that such consequences should ensue. But this is equally true of the Salvationists in *Beatty* v. *Gillbanks*,[16] or, for example, a conservative speaker who holds an election meeting in a communist district where his previous attempts to hold meetings have been broken up in disorder. Both are prepared to risk disturbances which it is the duty of the police to prevent in the last resort by dispersing the meeting. But Mrs. Duncan neither caused nor apprehended disorder at her meeting. It would thus appear that the common law of England, which rightly penalizes the speaker who persists in insulting language and behaviour (*Wise* v. *Dunning*[17]), has ceased to protect the speaker who merely desires to give expression to his opinions without causing any obstruction or committing, inciting or provoking any breach of the peace.[18]

It is submitted that, not only is there no right to hold a public meeting as the law stands to-day, but every promoter of such meeting may have to face what is in effect a double trial:

(i) by an administrative official—a police officer, who can

[16] (1882), 9 Q.B.D. 308.
[17] [1902] 1 K.B. 167.
[18] [1936] 1 K.B., at p. 219.

decide beforehand whether he is prepared to allow the meeting to be held. If he is willing to approve the meeting, the courts are unlikely to be troubled with a case against the promoters, though of course proceedings against both onlookers and participants may ensue if disorder breaks out, as on the occasion of the march of the British Union of Fascists in S.E. London in October 1937.

(ii) by the courts: possibly if the promoter fails to obtain previous police approval, certainly if he declines to accept police refusal to grant such approval. For the police can intervene not merely on account of a breach of the peace, actual or apprehended, but also may stop a meeting or a procession if it can be shown that it causes an obstruction by interfering with the ordinary use of the highway.

It is not for a lawyer as such, even a constitutional lawyer, to say whether the power of licensing public meetings ought to lie with the police. But the result of the existing law is that it does. As citizens of a democratic State we may pause to inquire whether it would not be better to provide a reasonable measure of free facilities for public meetings adjacent to the highway or (as at election time) in public buildings for those who wish to air their political views among their neighbours. If free discussion is accepted as an essential liberty, ought the law to permit the police to hamper it as regards the place of its exercise merely on account of suspicions as to probable consequences?[19]

* * * * *

Dicey's third question was: "What are the rights of the Crown or its servants in dealing with an unlawful assembly?

The question to-day resolves itself into an examination of the powers of the police in dealing with meetings and processions. So far as statute law is concerned the following list of Acts, though not comprehensive, gives some idea of the wide powers of the police to start prosecutions.

(1) 13 Car. II, s.1.c.5 (1662) is an Act against tumultuous petitions to the King or Parliament, which was not repealed by the Bill of Rights.

(2) The Riot Act, 1714, provides in substance that, if twelve or more persons, whose conduct in the opinion of a magistrate is riotous, continue together for one hour after he has read to them the proclamation ordering them to disperse, fail to disperse at the expiration of the hour, any force necessary to disperse them may be used and the alleged riotous assembly becomes a felony, if it has not already become so because of the commission of some such act as arson or other malicious damage to property.

(3) Much of the legislation which was passed between 1790 and 1830 was of a temporary character or has been repealed. It was largely inspired by the fear of the governing classes lest the events of the French Revolution should be repeated

[19] Discussion of the law as to public processions, and the meaning of unlawful assembly has been omitted.

in England. But in addition to the Incitement to Mutiny Act, 1797, there remain on the Statute book the Seditious Meetings Act, 1817, so far as concerns s. 23, which makes meetings of more than 50 persons when Parliament or either House is sitting, unlawful assemblies if held within one mile of Westminster Hall, and the Unlawful Drilling Act, 1820, aimed solely against meetings for drilling and arming. Within the last few years two speakers were charged under the former Act with disturbing the peace and as inciters of persons to take part in mass demonstrations which were calculated to involve a contravention of the provisions of the Act.

(4) Highways Act, 1835, s. 72, makes it an offence to obstruct the passage of any footway or other highway. It is no defence that part of the highway is left clear for the passage of other users: *Homer* v. *Cadman*.[20]

(5) In the Metropolis s. 52 of the Metropolitan Police Act, 1839, empowers the police to make regulations as to routes and to prevent obstruction of streets and thoroughfares within the Metropolitan Police District on the occasion of public processions—s. 54 of the same Act imposes a summary penalty for the use of threatening, insulting or abusive words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned in any thoroughfare or public place. The Town Police Clauses Act, 1847, which since the Public Health Act, 1875, s. 171, has applied to all Urban Districts (outside the Metropolitan area) empowers the police to make orders for preventing obstruction in the streets during public processions, rejoicings, illuminations and *in any case when the streets* are thronged. This Act contains a power of arrest without warrant of any person found committing any offence under the Act, whether punishable upon indictment or upon summary conviction. Section 28 of this Act creates a large number of offences relating to obstruction, annoyance or danger to residents or passengers in any streets. Amongst other offences are those of placing or leaving . . . any cask, tub, basket, pail or bucket . . . or placing or using any standing place, stool, bench, stall or showboard on any footway. These provisions seem to hinder the activities of the tub-thumper. Moreover, the use of profane or obscene language in any street is also punishable. There are in addition a variety of Acts which enable local authorities to place restriction by means of by-laws upon the use of public open spaces, such as recreation grounds. By the exercise of such powers restrictions may be placed upon the holding of public meetings.

(6) In cases where serious disorder results in damage to property owing to the activities of a meeting, the Malicious Damage Act, 1861, makes it a felony to demolish or pull down or destroy property, or to begin to do any of these things. The Act also creates many other offences relating to injury and destruction to property. Under this head should also be mentioned the Riot (Damages) Act, 1886, which requires the rate-payers to make compensation to individual property owners whose premises have been injured or destroyed.

(7) More specially concerned with meetings, as such, is the Public Meetings Act, 1908, as amended by the Public Order Act, 1936, s. 6, which imposes a penalty on the breaking up of a public meeting and gives the police power upon reasonable suspicion to take, at the request of the chairman, the name and address of any person who acts in a disorderly manner at the meeting. The Act, as amended, contains a power for the police to arrest any person suspected of committing any offence under the Act who refuses to give his name and address to the police; a constable may also arrest him without a warrant if he reasonably suspects such person of giving a false name and address.

(8) Finally there are the provisions of the Public Order Act, 1936, which, in addition to prohibiting the use of uniform in connection with political objects and prohibiting quasi-military organisations, gives the police power to give such directions to the organisers of processions as they may think necessary for the protection of public order, including conditions prescribing the route and prohibiting the entry to any public place specified in the directions, s. 3 (1). We have already noticed the wider powers of this section which enable a general prohibition to be imposed on all meetings in defined areas for a period not exceeding three months. Section 4 prohibits the carrying of any offensive weapons at public meetings and processions. Section 5 makes applicable to any public place or any public meeting the existing prohibition under the Town Clauses Act on the use of threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace. Actually, this does not seem to add much to the existing state of the law—at all events as regards street meetings and processions. The

[20] (1886), 16 Cox 420.

earlier legislation, which was enacted in an age when Governments feared revolution, rather than disorder, is not in practice enforced to-day. Its retention on the Statute book does, however, invest the authorities with power to impose restrictions of unnecessary severity, should the decision to enforce the letter of the law be taken in times of political crisis.

The civil remedies of trespass and nuisance which were mentioned in the first part of this article are not in practice available to the police, and indictment for a public nuisance is too clumsy a weapon. There remain a number of criminal offences which may apply in the circumstances of a particular meeting, such as criminal libel and the various offences comprehended under the title of sedition, blasphemy, obscenity, unlawful assembly, rout and riot. Of these it is seldom that any offences are charged other than unlawful assembly and common law riot. Recent practice seems to indicate that, although the police may bring charges of these crimes in the case e.g. of disturbances at a pit-head during a colliery strike, they use other weapons to impede the conduct of meetings where they deem it desirable to intervene. In the twelve months prior to July, 1937, there were 320 prosecutions arising out of public meetings and processions. The bulk of these cases were charges of insulting behaviour, obstructing the police or assault. In only 27 cases were sentences of imprisonment imposed.[21] *Duncan* v. *Jones* obviates the necessity of proving that a meeting is unlawful before it can be dispersed. *Thomas* v. *Sawkins* gives the police the right of entry to any meeting to which the public is admitted. And who will question but that the presence of the police may be a powerful deterrent to free discussion of at all events political matters?

Finally, there is a power vested in justices of the peace to control the holding of public meetings indirectly by making orders binding over the promoters and others to keep the peace, or alternatively to be of good behaviour. *Lansbury* v. *Riley*[22] recognises this long established power of obscure origin. Possibly it rests upon the statute of 1360; possibly it is a common law power implicit in the commissions held by justices of the peace. Presumably the power cannot be invoked to restrain the holding of meetings which have a lawful object solely on the ground that the opponents of the promoters may commit breaches of the peace if the meeting is held. But it is not necessary to prove that any individual person goes in bodily fear in order to obtain the order for entry into surety for good behaviour. It may be remembered that the advertised speakers at meetings in connection with the hunger marches of a few years ago were required to

[21] H. of C. Debates, Vol. 326, col. 350.
[22] [1914] 3 K.B. 229.

enter into such sureties in advance of the meetings. It is, of course, true that the duty to exercise this power lies with the magistrates, and not with the police. But it would seem difficult for any bench of magistrates to refuse the application made by a responsible police officer who stated his *bona fide* reasons for objecting to a meeting, whether on the grounds of an apprehended breach of the peace, or the past reputation of an advertised speaker.

In brief it would seem that the statute law, even before the Public Order Act, was adequate to enable the police to control actual disorder at meetings. The Act admittedly gives them greater power with regard to processions, in that they may now persuade the appropriate authority to prohibit all processions for a space of time in a given area, but otherwise it seems to add little to the existing state of the law so far as actual meetings and processions are concerned. The ordinary range of criminal offences, with the possible exception of unlawful assembly, lies dormant: the modern practice is to impede the holding of meetings which come under a police ban by charges brought under the Prevention of Crimes Acts or for insulting behaviour or assault, or by applications to bind over the promoters in advance to be of good behaviour. These powers, coupled with the power of entry recognised in *Thomas* v. *Sawkins*, enable the police to control and, if need be, to prevent the holding of meetings.

4. What, finally asks Dicey, are the rights possessed by members of a lawful assembly when the meeting is interfered with or dispersed by force?

The answer to this question is of general application, though strictly it ought only to apply to public meetings held off the highway in some place such as a hired hall where questions of trespass, obstruction and nuisance do not arise. But in practice organised meetings and processions are permitted to take place in or near the highway and therefore the rights of the promoters of such assemblies if the proceedings are interrupted by opponents or dispersed by force do not differ from those of promoters of indoor activities.

The Public Meetings Act, 1908, as amended by the Public Order Act, 1936, s. 6, affords some measure of statutory protection. *Burden* v. *Rigler*[23] shows that it is no defence to a charge under the Act of disorderly behaviour at a public meeting to plead that the meeting was unlawful simply by reason of the fact that it was held on the highway. This does not, of necessity, make a meeting unlawful; each case is a question of the reasonableness of the user of the highway in the particular circumstances.

[23] [1911] 1 K.B. 337.

The Public Meetings Act is not, however, a particularly effective measure, and has not been much used. But it does, as amended by the Public Order Act, give a weapon to a chairman, which he may use effectively if there are police present at the meeting, since it is now within the chairman's power to request the police (but not private stewards) to take the name and address of a person suspected of acting in a disorderly manner. The police are empowered to arrest any one who refuses to give his name and address or who is suspected by a constable of giving a false name or address.

Apart from this enactment it is clearly the duty of the police to preserve order. Whether or not they are invited to attend a meeting, the preservation of the peace is their paramount duty: as the Bristol Riot Case of 1831 shows; and *Thomas* v. *Sawkins* gives them a right of entry to a meeting, even against the wishes of the promoters. Once the police are present, it is their duty to take all possible steps for the preservation of order. But a meeting convened for a lawful object must not be dispersed in order to prevent opponents interrupting, unless and until it is plain that by no other means can the peace be preserved. For this there is judicial authority both in *Beatty* v. *Gillbanks* and the Irish case of *The Queen* v. *Justices of Londonderry*,[24] as qualified by *O'Kelley* v. *Harvey*.[25] Field, J., in *Beatty* v. *Gillbanks* said[26]: "What has happened here is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for this proposition."

Holmes, J., in *The Queen* v. *Justices of Londonderry* referring to *Beatty* v. *Gillbanks*[27] said: "The principle underlying the decision seems to me to be that an act, innocent in itself, done with innocent intent and reasonably incidental . . . generally in the exercise of a legal right does not become criminal because it may provoke persons to break the peace or otherwise to conduct themselves in an illegal manner."

The remedy is clearly the presence of sufficient force (whether of police or private stewards) to preserve order. Only in the last resort, as *O'Kelley* v. *Harvey* shows, should the step of dispersing the meeting be taken by magistrates or the police—that is if all other means, such as the arrest or dispersal of interrupters, the

[24] (1891), 28 L.R. Ir. 440.
[25] (1882), 14 L.R. Ir. 105.
[26] (1882), 9 Q.B.D. at p. 314.
[27] At pp. 461–2.

strengthening of the numbers of stewards or of the police present, have failed; then, and only then, should a lawful meeting be dispersed. Of course if promoters and their sympathisers have already come to blows with the opponents, the meeting can at once be dispersed, for it has ceased to be lawful. But it is obvious that the mere presence of the police will normally reduce the prospects of such a conflict. If it does not, the armoury of the criminal law provides a choice of weapons, though none of these will mend the broken heads and frayed tempers.

It is not a desirable state of affairs that the surest way to enjoy freedom of speech is to post a policeman or two at the door, and there are meetings with perfectly legitimate objects where the presence of the police would tend to restrict rather than to preserve free expression of opinion. For many speakers think that a policeman is apt to interpret fair criticism of authority as justifying an apprehension of a breach of the peace.

The only course open to those who feel this objection is to provide their own body-guard of stewards if opposition is feared. But this, though used by the police as an excuse for not interfering with the activities of stewards inside a building where a fascist meeting was being held in 1934, will no longer ensure privacy from police supervision. For it must be repeated that *Thomas* v. *Sawkins* has given the police a right of entry, and since they now have such a right, it is obviously to be exercised whenever disorder is to be feared. No longer can the police (if indeed they ever could) stand outside a hall and collect the interrupters as they are deposited by private stewards in the streets.

The remaining question is—whether a distinction can be drawn between two such cases as the following:

> (1) A conservative speaker organises a meeting in a district hostile to his party, knowing that outsiders will, as on previous occasions, certainly try to break up his meeting.
>
> (2) A fascist at a meeting uses terms which are insulting, but not in themselves unlawful, directed against Jews, many of whom are present, knowing that because of his remarks fights are likely to follow.

Both speakers may be assumed to be addressing meetings which have been properly convened in places where no trespass, nuisance or obstruction is in question.

As to the conservative speaker, he is, it seems, in a position covered by *O'Kelley* v. *Harvey*. The object of his meeting and the conduct of his supporters are, one may assume, strictly lawful.

But if the meeting provokes either a breach of the peace, or a reasonable belief in those responsible for the maintenance of order in the district, whether magistrates or police, that a breach is inevitable, the meeting may be dispersed. But such a situation may usually, though not always, be avoided by the presence of police at the meeting.

The fascist will probably find himself in the position of the defendant in *Wise* v. *Dunning*, because insulting behaviour, even if it involves the utterance of words which are not in themselves unlawful, amounts to unlawful conduct. He may thus be summoned before magistrates who may require him to enter into sureties for good behaviour, as well as be prevented by the police on the spot from continuing his address. I am disposed to leave him to this fate for the law regards the infirmity of human temper to the extent of considering that a breach of the peace may be the natural consequence of insulting or abusive language or conduct.[28]

The conservative speaker is clearly in the stronger position. He may not succeed in delivering his speech. He can at least ensure that the police help him to achieve this, and he will not run any risk of unlawful conduct on his part, if they fail and he then abandons the meeting.

E. C. S. WADE.[29]

[28] *Wise* v. *Dunning*, [1902] 1 K.B., at 179–180.
[29] Dr. Wade is Lecturer in Constitutional Law in the University of Cambridge.

THE DISINTEGRATION OF EUROPEAN CIVILISATION AND THE FUTURE OF INTERNATIONAL LAW

Some Observations on the Social Foundations of Law

At a moment when the immediate danger of war appears to have been averted and a breathing space has been secured, it behoves the international lawyer, and indeed every lawyer to pause for reflection, to consider the impact of the momentous changes in the structure of international society on the rule of law in international affairs. Nor should such reflection be merely retrospective. It should give some guidance as to the direction of future work. Certainly, the international events of the last few years, culminating in the last few months, cannot be passed in silence by the international lawyer, unless he considers his learning as an end in itself, entirely detached from social reality. In the face of the many challenges to International Law experienced during the last decade, it has been argued that International Law has always been an imperfect system, subjected to many violations, but that it has, on the whole, withstood the test of time. Further, there is a genuine, if often inconsistent desire, on the part of international lawyers, to leave politics alone. Unfortunately, politics have not left international law alone. And leaving politics alone amounts only too often to maintaining rules of law based on the political facts of a past period.

Whatever the final outcome of the present international crisis may be, it has already produced one clear result: the collapse, in Europe at least, of International Law as a system of rules governing the conduct of nations in their mutual relations. It is not necessary to enumerate all the symptoms of decay. Most significant are perhaps the following—

1. Intervention in the internal affairs of other states, and, indeed, incitement to insurrection, in the name of ideas incompatible with the existing rules of International Law, is now a principal factor in international relations.

2. Not only collective security, but collective law has been largely abandoned in favour of bilateral understanding (sometimes taking the form of treaties, chiefly in commercial matters, but often expressed in form of statements of policy, purposely devoid of legal precision).

3. The principle of equality of nations, always of doubtful reality, but reinforced through the League Covenant, has been reduced to a shadow by the return to the Concert of Powers.

4. The principle of *pacta sunt servanda*, considered by many distinguished writers as the fundamental assumption from which the validity of

international law is derived,[1] has been further undermined by the silent breach or lapse of many international treaties, like the arbitration treaty between Germany and Czechoslovakia, the treaty of alliance between France and Poland, not to speak of the League Covenant or the Kellogg Pact.

5. In so far as one can speak of a peaceful solution of the Czechoslovak problem, the instrument has been mediation, i.e. a method of peaceful settlement not based on legal principles, but on political expediency. Attempts to introduce either arbitration or judicial settlement have completely failed.

It is not the purpose of this article to indulge in lamentations, but to analyse briefly the deeper causes of these symptoms and to urge upon the science of international law the need to take note, at last, of the profound changes in the structure of international society which make it imperative to re-examine the social foundations of International Law.[2]

The question is nothing less than this: European Civilisation has shaped modern International Law. But is European Civilisation still what it was, and, if not, how do the changes affect International Law? Every year has brought that question nearer, and it is no longer possible to evade it by either characterising the challenge as transitory or by attempting to maintain the universality of International Law through an emasculation of its rules, e.g. of the provisions of the League Covenant. The task then should be to examine the bases of International Law, to ascertain how far they are still valid, and on which foundations International Law must be rebuilt. More specifically, this should enable the international lawyer to make his contribution to the burning question of the day, how far dictatorships and democracies can peacefully live side by side and co-operate under common rules of conduct.

For reasons of space, it is not possible to give more than the barest outline of the chief problems and suggestions, leaving their elaboration to more detailed studies.[3]

I. Nature of the Challenge

The present crisis of international law is the result of a twofold threat to the foundations of international law—

(*a*) The internal life of most state members of the family of nations has changed so that the freedom of the individual, which forms the basis of many rules of international law, has been severely curtailed or abolished. In many fields, mainly in matters of social and economic planning, the transformation

[1] Cf. quotations, in *Oppenheim* (5th ed. by Lauterpacht), I, 695, n. 7; in particular Anzilotti, *Cours de Droit International*, I, p. 44.

[2] Cf. my article in *Contemporary Review*, July, 1937.

[3] Cf. on one aspect of the problem (State control over the individual) my article in *British Year Book of International Law*, 1938, pp. 118 *ssq*.

is almost universal, although with widely differing emphasis. In other fields, notably those concerning the cultural and intellectual freedom of the individual, the movement is so far confined to an important group of states and a dividing line is thus created between various nations. For International Law the consequence is that—

(1) A large number of human relations, formerly private, now become public, and therefore come within the purview of Public International Law (trade, industrial enterprise, many social activities, broadcasting, etc.).

(2) A split of increasing intensity is created between states which are supposed to belong to a universal family of nations, in so far as they differ on fundamental social and political values on which International Law assumes universal agreement (indestructible rights of the individual, administration of justice, etc.).

(*b*) While the aforementioned factors operate to uproot essential rules and principles of International Law, regardless of whether the various members of the family of nations still wish to be bound by common rules or not, this tendency is reinforced by the attitude taken in theory and practice by some totalitarian, and in particular, recently, by fascist states.[3a] The previous challenge to the universality of international law, which, after the war, came from Soviet Russia, differs from the present fascist challenge. It attacked at first the State, the instrument, as it were, of capitalism, as the basis of international society, and only admitted a transitory international law, on the old basis, pending the completion of world revolution. As it became clear that the period of transition would be a very long one, to say the least, the state as a subject of international law was gradually reinstated, albeit with emphasis on the class character of the Soviet state.[4]

[3a] The term "fascist" is meant to include, in this article, National Socialism.

[4] It is not easy to follow the phases of Soviet Russian theories on International Law. The two principal authors, representing different periods of political development, and, correspondingly, widely differing in their teaching, are Korowin and Paschukanis. The former, in his *International Law of the Transition Period* (German translation: *Voelkerrecht der Uebergangszeit*) outlined an International Law valid for the transitory period between the Russian Soviet State faced with capitalist States, and the eventual achievement of World Communism; this system contained many traditional features, but emphasised the need for solidarity of ideas as a basis of more intense international relations, thus limiting the sphere of legal relations between communist and capitalist states. In a later textbook (Moscow, 1926) Korowin modified these views, which were less and less in accordance with the practical conduct of affairs by Soviet Russia, after her recognition by most other states. Paschukanis (*International Law*, Moscow, 1935) emphatically reinstates the State as sole subject of International Law, denies the necessity of common social values and ideas as the basis

The Russian challenge has greatly lost in intensity, in the same measure as Soviet Russia abandoned the idea of world revolution, returned to the national state as basis of organisation and social life, joined the League of Nations, concluded international treaties of all types, and was more and more put on the defensive. Whatever one may think of the duration of the change, in practice Soviet Russia has not, in recent years, challenged fundamental rules of International Law.

The present challenge comes, in practice, chiefly from Germany, Italy and Japan, and is theoretically supported mainly in Germany. The chief principles of the fascist challenge to International Law are the following[5]—

1. Although the State is internally more powerful than ever, and Fascism leaves no doubt about the absolute primacy of the State over any international authority in international relations, another conception, developed by National Socialism and likely to be adopted by Italian Fascism, dynamic in character and hardly capable of legal definition, stands side by side, and, in certain respects, above the State: The *Volksgemeinschaft*. This is an entity wider than the State, and, in the relations between Germany and other States, one which overrides the sovereignty of any State (other than Germany herself). It includes all people of German language and culture, whatever their nationality and loyalty. The notion of *Volksgemeinschaft* is, purposely, somewhat elastic. It came into play in the recent conflict over Czechoslovakia, and justified, from the German point of view—

(*a*) Insurrection of Czech citizens of German culture.
(*b*) Intervention by Germany.

According to customary International Law, such action constitutes, of course, a grave international delinquency. The idea of *Volksgemeinschaft* certainly presents a novel legal problem. While the State is, even in the fascist conception, the form in which the nation organises itself, and therefore the basic unit

of international relations, but stresses at the same time the character of International Law as an instrument of policy helping the progress of the Soviet State. (Cf. Makarov, *Zeitschrift fuer auslaendisches oeffentliches Recht u. Voelkerrecht*, 1936, 479–495; Taracouzio, *Soviet Union and International Law*, 1935; Maurach, *Zeitschrift für Völkerrecht*, 1937, 19–45.

Totalitarian systems, communist or fascist, have no room for a detached science. It has to serve politics, and consequently theories have to follow the changing trends of state policy. On the analogous developments in National Socialist Germany see below p. 199.

[5] Cf. Bockhoff, *Völkerrecht gegen Bolshevismus* (1937); *Tatarin-Turnheyden, Archiv für Rechts- und Socialphilosophie* (1936), 295–319; Maurach, *Zeitschrift für Völkerrecht*, 1937, 19–45. Guerke, *Völkerrecht*, 1936, p. 13. From 1936 onwards German publications on International Law show a much more aggressive tendency, and an attempt to split the nations according to their political structure.

of international relations, this new conception, always ahead of the State, is used to justify intervention and, indeed, disruption of other states.

2. There is no universal international society bound by general rules of conduct. This conception belongs to a bourgeois-liberal period, and only states still dominated by that outlook will still adhere to such a conception. International relations can only legally exist between states of similar political outlook[6] (Anti-Comintern Axis). From the point of view of National Socialism, states repugnant to its political outlook are not only no members of international society, but outlawed (Soviet Russia).[7] This lawlessness would extend to such states as, through their liberal-democratic structure, would lend support to the Communist International. Such a position justifies intervention, e.g. in civil wars (Spain).[8]

3. While international society is thus redefined on the basis of friend and enemy,[9] there is no suggestion of an order of law binding even those states considered as members of international society. Nor is any higher authority, judicial or otherwise, recognised. This would obviously be in contradiction to the nationalist ideology of fascist states which does not recognise an arbiter above the nation, and to its political structure which makes the word of the leader law, in international, and, to a growing extent, in national affairs. Instead, fascist states conclude bilateral agreements, in commercial as well as in political matters. As bilateral non-aggression pacts replace the League Covenant, so bilateral commercial treaties replace the most-favoured nation clause.[10] Political pacts do not always take the form of a treaty, but often that of proclamations (e.g. Hitler-Chamberlain declaration). Nor will treaties concluded by fascist states in political matters contain a submission to any legal procedure.

4. It follows from fascist philosophy and practice that a stable international order is neither contemplated nor desired. While bilateral understandings are frequent as tactical moves in order to cover flank or rear, change and fight are both essential creeds of Fascism.[11] Nor is peaceful change contemplated in the form of legal procedure of which Art. 19, League Covenant, gives a very rudimentary and imperfect example. The methods

[6] This attitude becomes predominant only from 1935 onwards. In the first few years National Socialism emphasised its purely internal character.

[7] Verdross, *Völkerrecht*, p. 27. Bockhoff, *loc. cit.*, p. 217 and *passim*.

[8] Bockhoff, *loc. cit.*, pp. 238 *et seq.*, 233

[9] Cf. Carl Schmitt, *Der Begriff des Politischen*, 2nd ed., 1934. Bockhoff, *passim*.

[10] Cf. Sommer, *Z. Öff. R.*, xvi (1936), 265.

[11] Cf. Mussolini, *La Dottrina del Fascismo*, 1932.

of peaceful change adopted by fascist states are illustrated by recent history.

5. In the fascist conception law is, like every other social activity, an instrument of politics, designed to further the greatness of the nation.[12] Legal arguments are produced *ad hoc*. To give a recent example—

While Czechoslovakia, France and Russia, had non-aggression treaties with each other, it appeared desirable to prove the invalidity of such treaties. A recent German monograph argued that treaties aiming at opposition to proposals envisaging a revision of the *status quo* are legally invalid, even if concluded in the form of non-aggression treaties.[13] Another proved that intervention on the side of Franco was justified since his rebellion was in legitimate defence of the rights of the nation and the Government, because of its domination by communism, was outside the law.[14] It might be said that totalitarian states could well spare the exertions of lawyers to justify their actions, but one of the greatest historians of all times has observed that nations are ashamed of the power so ardently desired and attained by means of all sorts of crimes, since law has still a magic sound, that they do not wish to dispense with before mankind.[15] In a less radical form, International Law has often fulfilled that function, at least since the days of Vattel.

II. Historical Parallels

Has there been a comparable challenge to the structure of modern International Law before? The answer is in the negative. The French Revolution of 1789 might have constituted a challenge comparable to that of the Bolshevist Revolution, but its only effect was the negative one of suspending international order in Europe for a while, and the propagation of new ideas which were to change international society gradually during the nineteenth century. The Holy Alliance affords a better parallel. Its chief impact on International Law lay in the application of certain principles of intervention, in the name of certain political principles (legitimacy, in practice autocracy) to the liberation movements of various nations. The Holy Alliance was defeated by the stronger forces of nationalism and liberalism, before it could produce a lasting split in international society. These parallels cannot, however, go very far. The modern challenge to

[12] This is rather similar to Soviet Russian theory as recently put forward by Paschukanis (*loc. cit.*, p. 15), but goes much further in the conclusions.

[13] Mandesloh, *Politische Pakte und Völkerrechtsordnung*, 1937.

[14] Bockhoff, *loc. cit.*, p. 233.

[15] Burckhardt, *Weltgeschichtliche Betrachtungen*, p. 36 (Kroener ed.).

International Law challenges a system infinitely more comprehensive than that which existed a century ago. Almost all that part of International Law which regulates positive co-operation between states in matters of transport, commerce, education, law, through bilateral, multilateral and universal treaties and conventions,[16] starts with the second half of the nineteenth century.[17] This has made a measure of agreement on social and political values much more essential than in previous periods when international public relations were mostly of a formal character.

III. Some Bases of Modern International Law

Before we can estimate the extent of the new challenge and disintegration, it is necessary to be clear as to the essential social values which are at the bottom of modern International Law.

1. *Christian Civilization* is, as is generally asserted, the basis of modern International Law[18] but this is, of course, not to be understood in the religious sense, since many non-Christian nations now form part of the family of nations. It is only in a very general sense true of the moral conceptions of Christianity (humanitarian principles). In practice, the requirements are reduced to certain standards of state organisation.

2. *Democracy.* If it is often said that International Law, and in particular the League of Nations assumed universal democracy, it must be clearly understood that parliamentary democracy is not a condition of modern International Law. As long as there are clearly defined state organs capable of binding the state internationally, the internal constitution of a state is irrelevant. Seen from this angle, there is no reason why democratic and autocratic states should not co-operate with each other to any extent. What is really meant by such dicta, is probably a certain outlook on international affairs and certain conceptions of the rights of mankind, usually, but not necessarily associated with modern democracy.

3. *Peaceful Settlement of Disputes.* The conviction that peaceful settlement should supersede war has grown, with the intensification of international relations, during the 19th and early 20th centuries, and has expressed itself in a growing number of bilateral and general treaties of conciliation, arbitration and judicial settlement, culminating in the League Covenant, the Kellogg Pact, and the General Act for the Pacific Settlement of

[16] Styled by Verdross, *Völkerrecht*, p. 12, "Verkehrsrecht."
[17] Cf. Appendix A in *Oppenheim* (5th ed. by Lauterpacht), vol. I, 1937.
[18] Cf. all leading textbooks and Smith, *British Year Book of International Law*, 1937, 32.

International Disputes of 1928. It has been shown above that this outlook is not shared by Fascism.

4. *Principle of Tolerance.* Tolerance towards different forms of governments and ways of political life is an essential principle of modern International Law. Every sovereign state is recognised as a member of the family of nations, provided it fulfils certain minimum requirements of state organisation.[19] This principle, essential to the modern society of nations, but operating on the tacit assumption of certain standards universally valid among civilised nations, is emphatically challenged by fascist states, which establish a new kind of legitimacy, while the non-fascist states still apply the old principle towards all nations, fascist or not. This discrepancy has produced some most astonishing situations, notably in regard to the Spanish Civil War, where some states which are parties to the Non-Intervention Agreement, at the same time consider one of the contending parties as outside the law.

5. *Freedom of the Individual from State Control.* The liberal idea that state functions should be those of the guardian only, and keep clear of the social life of the community, underlies numerous rules of International Law which become inapplicable as numerous states assume an increasing measure of control over the life and activities of their citizens. At present there is a wide divergence between the states as to the extent of this control. This operates as a disintegrating factor.[20] It is safe to predict, however, that there will be gradual assimilation in the sense of universal state control over most walks of life, stimulated by the growing complexity of modern life and the permanent state of mobilisation into which one state after the other is putting itself, whether for purposes of expansion or of defence. The effect of this development upon International Law I have discussed elsewhere.[20]

6. *Protection of Indestructible Rights of the Individual.* How far International Law protects certain rights of the individual is a very difficult question, and this is also the point where principles of totalitarian and of non-totalitarian states clash most sharply.

(*a*) Nowhere does positive international law expressly

[19] (A people, a country, and a civilised government.) It is, of course, controversial whether states have an actual duty to recognise new states and governments, if they fulfil these requirements. But since the collapse of the Holy Alliance recognition has not been made legally dependent upon internal political structure, although political considerations have often delayed recognition. (Cf. *Oppenheim*, 5th ed., I, pp. 112, 120 *ssf.*)

[20] *British Year Book of International Law*, 1938, 118 *ssq.*

guarantee individual rights. Resolutions like that of the Institute of International Law of 1929[21] express aspirations only. Certain international treaties have imposed duties of religious tolerance or towards minorities in connection with a wider settlement (Congress of Berlin, 1878; Peace Treaties 1919), but only upon certain smaller states, and there is no question of a general customary rule. Certain international treaties mention such rights by reference to the requirements of International Law,[22] which does not help us much.

(*b*) International Law does, however, base itself upon the recognition of certain rights of the individual, although the position is not very clear. The question arises in a twofold way—

1. Does International Law impose any absolute duties towards aliens upon the states?

In this connection many rights are enumerated, such as the right of asylum, of freedom of religion, freedom of commerce, human treatment, non-discrimination with regard to race, sex, nationality, language.[23] Even those, who assert that such rights are part of positive International Law, admit that every state has a very wide discretion.[24] It might be said that these rights formed part of International Law only in the sense of directing principles, without giving a claim to the individual, or to the state on his behalf. To say, however, that any of the above mentioned principles is still universally recognised even as a guiding principle, at the present day, would be a travesty. Nothing shows more clearly the disintegration and destruction of those standards of Christian morality which, even ten years ago, no nation would have contested in principle. Even if they had not yet hardened into rules of positive law, they provided that common moral basis, without which no community will for long continue to feel bound by a common law.

2. Are states bound to respect certain minimum rights of aliens when they take internal measures that affect nationals and foreigners?

It appears to be generally recognised that foreigners can demand equal treatment with nationals, and that, if general measures whether legislative, administrative, judicial, fail to observe a certain minimum standard, the foreigner is protected by International Law, and that the state which has taken the

[21] Cf. *American Journal of International Law*, 1930, p. 560.
[22] E.g. the treaty between U.S.A. and Germany, 1923, art. 1.
[23] Cf. in particular Scelle, *Précis de Droit International* (1934), II, pp. 42 *ssq.*; Mandelstam, *Hague Recueil* (1931), IV, 129–230.
[24] Scelle, *loc. cit.*, p. 71.

measures commits an international delinquency.[25] Which are these absolute standards? Life, liberty, and property are the vital values with the regulation and protection of which law is concerned.[26] In view of the divergences of municipal systems, it is obvious that International Law can only demand very little. But for the future of International Law it is a vital question whether there is a common international standard capable of rallying the various municipal systems round a common centre. Discussing the protection of individual rights by International Law, a learned writer could say, with some justification, only ten years ago—[27]

> "This recognition of the paramount importance of the individual gives a broader basis for international law, and the pressure of that law on behalf of individuals is tending toward such a uniformity of standard in domestic laws that he may more and more expect to receive a fixed minimum of rights and protection, no matter where he goes."

Such words could be written while the world was still agreed upon the inviolability of certain individual rights and values by the community. The struggle between the conflicting claims and conceptions of Liberty and Authority has been the central theme of mankind's political history. And for the last ten years the pendulum has swung back far from the point which it had reached. National political theories and laws are more and more moving in different directions, subjecting the international standards to intolerable strain.

1. *Protection of Life.* Although this question, being considered as beyond controversy, has not been much discussed, the general principle recognised as internationally binding, is undoubtedly that the life of an (alien) individual must not be taken arbitrarily. That the alien must submit to the national criminal law of the country which has jurisdiction over him, within very wide limits, is certain. Unlawful arbitrariness may occur in two ways: Life may be taken without adequate cause, or the procedure by which this is done may not afford the victim sufficient protection and defence. Of the first kind would be the example given by Fachiri,[28] obviously as an extreme case, unlikely to occur, that a state

[25] Cf., among many others, Scelle, *loc. cit.* II, 113; Fachiri, *British Year Book of International Law*, 1925, 82–90; 1929, 32 *ssq.*; Borchard, *Diplomatic Protection*, p. 21; De Visscher, *Hague Recueil* (1935), II, p. 376; Eustathiadès, *Responsabilité Internationale de l'Etat*, 1936, p. 262;

[26] Lord Macmillan in Preface to *Modern Law Review*, Vol. I, No. 1; Kaufmann, *Hague Recueil* (1935), IV, 427 *ssf.*, states as fundamental rights—

1. Life, Liberty, Honour.
2. Property.
3. Practice of Faith and Religion.
4. No denial of Justice.

[27] Eagleton, *Responsibility of States*, 1928, p. 222.

[28] *British Year Book of International Law*, 1929, p. 32.

should decree that all red-haired children should be put into a lethal chamber. The example, however, may not sound quite so fantastic at the present day, when the value of human life decreases as state worship increases. Nor is it fantastic to suppose that, as in Spartan times, some states may one day order the exposure of all weakling children born in the country. This, not yet of immediate practical importance, should illustrate the increasing difficulty of assuming universal standards as to the protection of human life. Of more immediate importance is the question whether the principles of *nulla pœna sine lege* and *nulla pœna sine prævia lege pœnali* form part of general principles of justice and thus of international law. Both have been abandoned in recent German laws[29], and the execution of van der Lubbe, for example, a Dutch subject, was only possible by a law promulgated with retroactive effect.[30] It has been argued by an eminent authority that the principle of *nulla pœna sine prævia lege pœnali*, although not directly part of customary international law, forms part of general principles of justice and equity, by which all states are bound.[30a] In that case international standards as to the protection of human life, the most fundamental of human values, are dissolving. On the procedural side, the attack is obvious. International legal literature, assured in what were the standards of civilised justice, is full of valuable precedents, most of them taken from the findings of Mixed Claims Commissions, established betwen U.S.A. and some Central American States (U.S.A.–Mexico; U.S.A.–Panama). One might formulate the following three principles—

1. Interference with life or liberty must be under the auspices of[31] a competent state authority, and not by arbitrary acts (Lynch justice).

2. Court proceedings which might result in the taking of life or the curtailment of freedom, must be based on proper investigation and give the accused an adequate opportunity of defence.[32]

3. A judicial authority which deprives an alien of his life or freedom must be independent. In particular, it must not act under pressure from the legislative or executive.[33]

[29] Cf. Preuss, *American Journal of Int. Law*, 1935, pp. 216–17; Van Hamel, *Iowa Law Review*, 1933–34, pp. 237–43; on the question in general cf. Frank, *Yale Law Journal*, 47, 165.

[30] Law of March 29, 1933.

[30a] Cf. Van Hamel, *loc. cit.*

[31] Eagleton, *loc. cit.*, p. 109.

[32] Numerous decisions of Mixed Claims Commissions, (cf. Chattin case and Neer case, (U.S.A.–Mexico) Opinions, 1927, p. 422, 71, Eagleton *loc. cit.*, p. 119, 120).

[33] Case of Robert E. Brown. Cf. *British Year Book of International Law*, 1924, pp. 210–221.

Whereas the first principle is not challenged by totalitarian states, which, on the contrary, have made state authority more comprehensive, the second and third principles are seriously challenged.

(*a*) Special police, with undefined powers, not subject to judicial control, has practically unlimited powers over life and freedom, in countries like Germany and Russia.

(*b*) Special Tribunals, with predominantly political composition, are constituted for the trial of political offences, and the range of political offences has been enormously increased in totalitarian states. (Cf. Italian Law of Nov. 25, 1926; German law of April 24, 1934; April 18, 1936.)

(*c*) Constitutional guarantees such as the equality of citizens before the law, the irremovability of judges, except by special legal procedure as a protection of their independence, have been abolished (cf. Weimar Constitution and Law of March 24, 1933).[34]

(*d*) Judges are partly authorised by law (e.g. German Law of June 28, 1935) or compelled in fact to judge in accordance with certain political principles. Where they refuse to do so, their judgment may be, in effect, nullified by political organs (Niemoeller trial).

(*e*) As in the days of Imperial Rome, the word of the Emperor (Leader) is more and more considered as law, in whatever form it takes.[35]

While there is, as yet, considerable reluctance to apply these principles to aliens, the tendency to do so is increasing, in particular in so far as the resident alien is bound to take part in the social and economic life of the nation (currency delicts, sexual intercourse, etc. or commits a political crime in the new, wide sense).[36] In any case, the indirect effect of such new methods and principles, even if only applied to nationals, is disintegrating upon the international minimum standard, in so far as it becomes more and more difficult to speak of a common international standard of justice.

2. *Liberty*. In principle, the same considerations apply to the protection of life; but the disintegrating effect of divergent political theories and, consequently, of national systems of law, is much more apparent, since the taking of life is a much rarer phenomenon than the taking of freedom. As examples of what

[34] Judicial independence is still preserved in principle (*Deutsches Beamtengesetz* of Jan. 26, 1937, art. 171).
[35] Cf. Bryce, *Essays in Jurisprudence*, vol. II, 308, *ssq.*
[36] Law of April 24, 1934. Cf. Preuss, *loc. cit.*, p. 214.

would till recently have been accepted as general principles of International Law in regard to the taking of freedom, the following may be quoted—

(*a*) Continuous imprisonment for failure to pay a debt, if there is no criminal offence imputed, would be contrary to international standards of justice.[37]

(*b*) Release of a murderer of a foreign national, sentenced to 18 years 4 months imprisonment, after 3 years 1 month, partly because of good conduct and partly because of a general amnesty law, is contrary to international principles of justice.[38]

The first principle would still hold good. Poverty is no crime in the eyes of liberals, democrats, fascists or socialists.

But the second principle would appear highly questionable at a time when great states include in frequent amnesties murderers, however short or light their punishment, provided their murder is of some political significance. And the notion of "political" is, for reasons inherent in totalitarian ideas, infinitely wide.

Of far greater importance still is the impact of divergent conceptions of freedom on the further development of International Law through general, multilateral or bilateral treaties. This for two reasons—

(*a*) The international protection of private rights, still in its infancy, was the object of gradual development through treaties, such as treaties of extradition, judicial relations, mutual recognition of judgments. This, however, becomes impossible where states cease to have similar legal conceptions or similar systems of procedure.

(*b*) States being the subjects of public international relations, law-making treaties cannot be concluded where one side is in a position to restrict the liberty of its citizens and the other is not. For example, a treaty between Germany and Great Britain imposing on the press the duty to abstain from criticism of the other party is possible for Great Britain only if she abandons the principle of freedom of opinion. A treaty imposing upon the contracting parties the duty to prohibit boycott movements against the other party, is in the same category. Whenever such differences have been bridged it has been done through assumption of state control. (Non-Intervention Agreement, 1936; Broadcasting Convention, 1936.)[39]

[37] Van Bokhelen's case; cf. Eustathiadès, *op. cit.*, p. 293.

[38] Sabla case (Panama-U.S.A. Mixed Claims Commission, Decision of, 29, VII., 33).

[39] Cf. *British Year Book of International Law*, 1938, 135, 146.

3. *Protection of Private Property.* The question how far private property is protected by international law, has received much more attention than the previous questions, owing to the measures of expropriation taken by Soviet Russia, and, in more limited fields, by other countries (Mexico, Poland, Roumania, apart from many measures of indirect expropriation, like the creation of monopolies, or stringent currency restrictions). The sanctity of private property as a principle of international law became questionable long before that of life or liberty, owing to the obvious tendency towards socialisation and state control. It is neither necessary nor possible to discuss the problem in any detail. The present position is that a great majority of writers and some judicial authorities (not many are conclusive) still uphold the principle that a state which expropriates the property of an alien without adequate compensation, as part of a general measure applicable to nationals and foreigners alike, commits an international delinquency.[40] But it is generally admitted that:

1. This is not a principle of "natural law," but one of positive law, dependent upon the practice of international society.[41]

2. The practical importance of the principle is much reduced by the power of states to interfere (without compensation) with private property through measures of administration, in particular police measures (U.S.A.) and taxation, and by the inapplicability of the principle to the suppression of private enterprise, although this may be a far more effective interference with private property.[42] To this may be added modern currency legislation which, in Germany for example, in many cases is practically equivalent to expropriation, but legally unchallengeable.

It may be safely predicted that the progress of ideas inimical to private enterprise and property as well as the process of peace time mobilisation adopted by all major nations will threaten further the principle in so far as it still exists, although at present many nations would still shrink from direct expropriation without compensation. Because of the above mentioned reservations, the trend towards planned society can only accentuate a process

[40] Cf. writers quoted above, p. 203, n. 25; also Borchard, *Opinion on Roumano-Hungarian Dispute*, 26 *ssq.*; Bullington, *A.J.L.*, 1927, p. 681; Judgment of Permanent Court of International Justice Series, A, No. 9; Against the principle: Fischer Williams, *British Year Book of International Law*, 1928, 1–30, and writers quoted by Scelle, II, p. 114. Apparently also *Oppenheim* (Lauterpacht), I. p. 284.

[41] Fachiri, *British Year Book of International Law*, 1929, p. 32 *ssq.*

[42] Bullington, *loc. cit.*, *Oppenheim* (5th ed.), Vol. I, p. 284.

long apparent, but not produce a departure from fundamental values, as is the case with the totalitarian ideas of life and liberty.

Individual rights then are fast losing that amount of international protection which pre-war society granted as a matter of course, and which post-war society believed for a while would be further strengthened and developed.[42a] Absolutism is on the ascendant again, this time combined with nationalist and socialist ideas, and the individual, in totalitarian states, is only a means, not an end.

IV. The Impact of the Changes on Positive Rules of International Law

Public International Law, as it stands to-day, is a medley of rules of widely differing social significance. Many are of a merely formal character, others, mainly modern treaty-made law, affect the social life of the nations. Accordingly, the changes in the structure of states do not affect the various parts of International Law with equal intensity. The following rough survey is an attempt to differentiate on a sociological basis.

1. *The Law of War.* The law of war can be left aside. The only way in which it might be affected is that, under the new fascist conceptions, a state not deemed worthy of being recognised as a member of international society may not be recognised as a belligerent and thus not enjoy, in relation to those states, such protection as the rules of warfare may afford in a modern war.

2. *Law of Peace.* (*a*) A large number of rules regulating the formal intercourse between nations remain unaffected. This is true of all rules defining the limits and scope of national sovereignty in international relations (territory, waters, open sea, etc.), and those regulating diplomatic relations between the nations.

(*b*) Rules dealing with international state responsibility are affected, as mentioned above, by the far-reaching extension of state control over matters formerly the reserve of the individual.[43]

(*c*) It has been apparent for some time that the new fascist conceptions are having a profound effect on the recognition of states and governments. In the Spanish Civil War recognition was withdrawn (by Germany, Italy, Portugal) from

[42a] In Private International Law, this development will be and is already reflected in an increasing application of the "ordre public" reservation, excluding the application of a foreign rule of law.

[43] Cf. *British Year Book of International Law*, 1938, pp. 118 *ssq.*

a sovereign government which, by International Law, was still entitled to it, and transferred to a rebel government which was not yet entitled to it. It was alleged that the constitutional government was an instrument of world communism and the rebels acted in defence of the nation. At the same time, a more traditional attitude was observed by the same states in so far as they became parties to the Non-Intervention Agreement which implied equal treatment of the parties. Of these two incompatible attitudes the former clearly prevailed in practice. The Spanish Civil War has brought out the fundamental incompatibility of the old and the new principles of recognition. One group of states applied the customary principles of recognition,[44] another applied new principles of legitimacy. That they are incompatible was shown by the history of non-intervention. It is only logical that new principles of recognition should also produce new principles of intervention.

(*d*) Whenever rules of International Law refer, expressly or by implication, to principles of law and justice universally valid among nations such rules will become unworkable as these principles cease to be of general application. We have discussed this question above, in connection with the protection of individual rights.

(*e*) *Conventions, Treaties, Agreements.* The principal agency of development of International Law since the last century has been the law-making treaty, which has often developed into customary law. This was the natural concomitant of the growing importance of international relations in times of peace and of the increasing importance of international co-operation in social, economic, technical, cultural matters. In a society practically devoid of agencies of legislation, and given the very slow growth of customary law, such co-operation found legal expression in bilateral, multilateral, general treaties. It is in this field, the field of international social co-operation that the consequences of the disintegration of international values are strongest. The main consequence is one not superficially apparent: the retarding of further development through the conclusion of new treaties or the more universal application and validity of partial law-making treaties. It is, however, essential to distinguish between various groups of treaties, not according to formal criteria, but according to their social substance.

[44] Subject to such deviations as described by several learned authors; cf. *British Year Book of International Law*, 1937, pp. 17 *ssq.*; L.Q.R. 1937, pp. 471 *ssq.*

I. The first fundamental distinction, of particular importance in view of the recent political developments, should be between understandings of a strategical character, and treaties laying down certain rules of conduct. Declarations like that signed by Herr Hitler and Mr. Chamberlain are obviously not meant to have any legally binding character. Further, bilateral non-aggression treaties, unless coupled with a more comprehensive understanding stipulating certain rules of conduct, are negative from the point of view of international legal development. They are mainly strategic in character, and strategic understanding is possible between states which, otherwise, have little in common. The non-aggression treaties between France and Russia or between Germany and Poland are examples, whereas the Little Entente or the Balkan Pact created at the same time certain permanent institutions pointing towards the subordination of the parties to certain rules binding on all of them.

II. Fundamentally different are all treaties regulating positive co-operation, and these will obviously be dependent, to a greater or smaller degree, upon common social and political standards. For the purposes of this enquiry, I suggest the following rough classification—

(*a*) *Treaties Regarding Technical Co-operation*[45] (e.g. Postal Conventions, Railway and Navigational matters, Road Traffic, Air Navigation, Metric, Statistical matters, etc.). These treaties are dependent upon a common minimum standard of efficiency and organisation, and almost completely independent of differences of ideology and social values. Nor have they been much affected by recent political developments.

(*b*) *Commercial Relations.* A distinction should be made between a technical and a non-technical side. Thus unification of the law on bills of exchange is essentially a technical matter. On the other hand, comprehensive commercial treaties are, in the totalitarian conception, an instrument of policy. Consequently, the most-favoured nation clause, based on the liberal idea of equality of all nations and the desirability of all-round free trade, is declining. Every most-favoured nation clause is the potential nucleus of a general international agreement, and this is directly contrary to the fascist conception of discrimination in international political, economic and, consequently, legal relations.[46]

[45] A differentiation between treaties of a technical type and those with social content is suggested by Korowin, *Völkerrecht der Übergangszeit*, p. 13, but it is not developed any further.

[46] Cf. Sommer, *Zeitschrift f. Öffentliches Recht*, 1936, p. 265.

(*c*) *Mutual Protection of Economic Interests* (Copyrights, trade marks, currency). On matters of industrial property, whether internally a matter of individual or of state responsibility, totalitarian tendencies should not have any appreciable effect, since the interest in securing protection abroad is unaltered. Bilateral treaties, however, are likely to be concluded only between states with stronger ties. But this more for general political than for specific legal reasons.[46a]

(*d*) *General Humanitarian Conventions* (Drugs, Slave and Women Traffic, matters of Health). These should, on the whole, belong to matters which are, even now, above differences of ideology.

(*e*) *Regulation of Social Conditions* (especially Labour). Bound up as organisation of labour and similar matters are with the social structure of a country, it is evident that they are directly affected by such differences in social ideas as those existing between democratic-liberal, socialist and fascist states. This is proved by the withdrawal of Germany, Italy, Japan, from the International Labour Office.

(*f*) *Judicial Relations.* These have hitherto been mainly fostered by bilateral treaties, and are strongly dependent upon common legal, i.e. social standards. The law on extradition has almost exclusively developed through bilateral treaties, and, whereas existing treaties may not be immediately affected, new treaties will hardly be concluded except between states with similar judicial conceptions of criminal law, and, in particular, of "political crimes." The notion of political crime is most strongly influenced by totalitarian conceptions, where it assumes ever greater proportions. Bilateral treaties regarding recognition of judgments will also be directly influenced by a divergence of legal conceptions, since quite apart from the question of "ordre public," no state will be prepared to recognise judgments of a state whose social and legal standards it mistrusts.

(*g*) *Unification of Laws.* International conventions on unification or assimilation of laws of a mainly technical character (Bills of exchange, bills of lading, collisions at sea, salvage at sea, etc.) will continue to operate and may be further developed.[46b] The less concerned it is with technical and

[46a] Cf. for Trade Mark Law the survey of International Conventions and Bilateral Treaties in Magnus, *Tabellen zum Int. Recht,* Warenzeithenrecht, 1938.

[46b] Such difficulties as exist (e.g. over the Uniform Law for Bills of Exchange and Promissory Notes, 1930) are due to technical differences, mainly between Continental systems on the one hand and Anglo-American Law on the other; cf. Gutteridge, *British Year Book of Int. Law,* 1931, 13–30; in regard to the Law of Sale, Gutteridge, *ibid.,* 1933, 75–88.

the more concerned with social matters, the more difficult will unification become (e.g. marriage, divorce,[46c] succession, crime, etc.). The difficulties resulting from differences between continental and Anglo-American conceptions of law are now becoming of secondary importance as compared with differences caused by diversity of social and political structure.

(*h*) *Educational and Cultural Co-operation.* These matters are most intimately connected with similarity of outlook and civilisation. Co-operation is impossible between states which do not share a common outlook on fundamental values. Such Conventions as those adopted by the seventh Pan-American Conference in 1933 and in 1936 on the teaching of History and the Peaceful Orientation of Public Instruction presuppose that strong community which is increasingly evident in the relations between the states of the American Continent.[46d]

(*i*) *Machinery for the Settlement of Disputes.* What has been said about bilateral judicial treaties, holds good for international treaties, bilateral, multilateral or general, concerning the peaceful settlement of disputes, whether by conciliation, arbitration or judicial settlement. Such treaties are, of course, by no means merely of a formal or procedural character. They form the super-structure built upon the foundation of common legal and social values. The gradual progress of such treaties was perhaps the most potent factor in the strengthening of the rule of law in the relations between nations. That it was difficult enough even before recent developments, is shown by the important reservations contained in the great majority of treaties (distinction between legal and political disputes, legal differences affecting the vital interests, honour or independence of the parties, etc.; such clauses amounted in effect to leaving the ultimate discretion to the parties, except in those rare cases, where the decision whether such a clause applied was itself left to an impartial authority).[47] Fascist theory and practice is openly hostile to submission to a prescribed method of peaceful settlement. In relation to states not bound to fascist states by close ties that follows from their rejection of any limitation of full freedom of action. But even in relation to friendly and

[46c] Cf. Gutteridge, *British Year Book of Int. Law*, 1938, p. 33.

[46d] Contrast the International Convention concerning the use of broadcasting, 1936, which was signed by most European States, but not by Germany and Italy.

[47] Cf. for an excellent survey, *Oppenheim* (5th ed., Lauterpacht), II, pp. 20–84, Lauterpacht, "Function of Law in the International Community," Part III.

similarly governed states it is not legal principles, but the unwritten community of ideals and interests which creates ties. The word of the leader pledges the nation, but not in a legal sense.

VI. General Conclusions

The effect of social disintegration in the international community upon the growth of international law goes much further than the immediate effect upon rules of positive law. International Law is still a very rudimentary system, with vast barren stretches between small cultivated areas. It is mainly the further growth of International Law as an organism in the life of which the whole of mankind partakes which has been severely impeded and probably stopped for the time being. Such growth as is possible in the world of today, will be that of partial, not of universal law, through an intensification of legal relations between such nations as are united by common values and interests and accept to some extent at least the rule of a law higher than their national law in their mutual relations. To recognise that International Law today can continue to be of universal validity only in some of its parts, and not in those which regulate more intensive co-operation, is only openly to recognise a fact which has been apparent for some years. Given the social and political situation of today, which the international lawyer is powerless to alter, the continued fiction of universal validity of all rules can only do harm to the progress of International Law. The effect until now has only been a fatal neglect of the essential social foundations of law. The result has been either the emasculation of an institution which, like the League of Nations, needed a strong background of social solidarity, or the fictitious maintenance of rules which not only were in fact not observed, but could not any longer be observed. The universality of International Law is no blessing in itself. The disintegration of international society may be a blessing in disguise for the science of International Law, if it finds itself compelled to redefine clearly the essential values which hold a community together. The chief issue today from which legal ties can spring is the meaning of Freedom. The liberal notions of the last century have largely gone, and totalitarian states have gone to the other extreme. Their answer at least is clear. The freedom and power of the nation is everything, that of the individual nothing. For the other states there is no other choice but either to fall into line or to redefine their notion of Freedom. If they fall into line, European Civilisation may again attain some kind of homogeneity, but it will not be a society

ruled to any extent by International Law. If the crisis compels them to redefine their own social values on different lines than a purely nationalist and totalitarian one, the nations which find themselves united in their attitude towards essential values may develop International Law to far greater intensity, by law-making treaties, which, perhaps, at some future date, may be the basis of universal law. The most encouraging example of development of International Law on these lines is the Law created by the Pan-American Union. Its Conventions, between 1928 and 1937, include such matters as Nationality, Extradition, Asylum, Rights and Duties of States in Civil Wars, Co-operation in matters of Education, Public Instruction, and Cultural Relations, and Pacific Settlement of Controversies.[48] Possibly recent events in Europe will draw the American States towards an ever-closer community of interests, and perhaps it will be their function, for some time, to preserve and develop International Law, while anarchy reigns elsewhere.

The answer which the international lawyer can give to the question of co-operation between states with different political and social structure, should now be clear—

They can live peacefully side by side, if they wish, and have no vital conflicts of interest and they can co-operate in such matters which do not affect or only affect superficially the social life of the nations concerned. But they cannot co-operate in other matters, except from case to case, and not in such a way that, through the agency of a common law, an international society could develop out of the various groups of states.

W. FRIEDMANN[49]

[48] For full texts see *American Journal of International Law* (1928), Suppl., pp. 124 *ssq.*; (1934) Suppl., pp. 61 *ssq.*; (1937) Suppl., pp. 53 *ssq.* Nothing illustrates the growing contrast of civilisations more than Art. 1 of the Convention concerning Peaceful Orientation of Public Instruction—

"The high contracting parties agree to organise, in their public educational establishments, the teaching of the principles of pacific settlement of international disputes and the renunciation of war as an instrument of national policy, as well as the practical application of these principles."

[49] Dr. Friedmann is a lecturer in the Law Faculty at University College, London.

SHIRVELL *v.* HACKWOOD ESTATES LTD.

The case of *Shirvell* v. *Hackwood Estates Ltd.*[1] in the Court of Appeal (Greer and Mackinnon, L.J J. and Bennett, J.) raises two points of interest: (1) What is the duty owed by an occupier of land to a person who is lawfully upon adjoining land as the adjoining occupier's invitee, and (2) a duty of care existing, what amounts to negligence in the maintenance of land where the condition of the land is dangerous.

(1) Simplified for the purpose of the first point, the facts were these: a landlord being in occupation of an estate let part of it to a tenant as a farm. Near the boundary of the part remaining in his occupation stood a dying beech tree, one of whose dead branches overhung the farm. The beech so standing constituted a danger, which existed at the time of the lease and remained substantially unaltered during the lease's continuance. Less than six months after the lease, the branch fell without warning and injured a labourer working on the farm. The labourer was employed by the tenant. Granted that the landlord (if under a duty of care) had been negligent, did the landlord owe a duty to the labourer?

It was stated by Bennett, J.,[2] that the landlord would in his opinion have been liable to the labourer had the case been one of adjoining owners not in the relation of landlord and tenant; but with Greer, L.J. (Mackinnon, L.J., expressly reserving his opinion) he held that the lease deprived the labourer of his remedy.

Since the danger existed at the time of the lease, the Court of Appeal was perhaps[2a] bound in accordance with *Cheater* v. *Cater*[3] to hold that, as between landlord and tenant, 'caveat lessee' applied: so that the tenant, if *he* had been injured, would have had no remedy against the landlord. But because the tenant is barred does it follow that the labourer is barred also?

Counsel for the landlord in the course of argument suggested[4] that it would be odd if the labourer had a better claim than the tenant against the landlord. But the landlord's immunity as regards the tenant appears to be a result of the contract between them. So far as the labourer is concerned, that contract is *res inter alios acta*. It was emphasised in *Cavalier* v. *Pope*[5] that the stranger could acquire no *rights* under such a contract against the landlord. Why should the landlord acquire rights under it against the stranger? The labourer is surely as much a stranger for one purpose as for the other; and there is certainly nothing odd in a stranger to a contract being as unaffected by the burden of it as he is by its benefit. Indeed to bar the labourer because the tenant is by his own contract barred seems very like 'identifying' the labourer with the tenant according to the doctrine in *Thorogood* v. *Bryan*,[6] a doctrine which was perhaps to be regarded as finally exploded in the *Bernina*.[7] If it be admitted, as I think it must (i) that the tenant is barred by reason only of his contract

[1] 54 T.L.R. 554 (which reports the judgments more fully), 1938, 2 All E.R. 1 (which reports counsel's arguments). Now reported in [1938] 2 K.B. 577.
[2] 54 T.L.R. p. 560.
[2a] In the current number of the L.Q.R. Prof. Goodhart discusses the effect of the precedents.
[3] [1918] 1 K.B. 247.
[4] [1938] 2 All E.R. 1, 3.
[5] [1906] A.C. 428
[6] (1849), 9 C.B. 115.
[7] (1888), 13 App. Cas. 1.

and (ii) that the labourer is an utter stranger to that contract, it would be very odd if the labourer did *not* have a better claim than the tenant.

To avoid a possible doubt, reference should be made (though they were not cited) to such cases as *The Kite*[8] where the defendant successfully claimed an immunity arising from contract against a plaintiff who was not a contracting party and to such *obiter dicta* as Goddard, J's, in *Fosbroke Hobbes* v. *Airwork Ltd.*[9] where it is suggested that the contracting party's licensee can have no better claim than the contracting party. In the first case the plaintiff's goods, in the second case the hypothetical plaintiff's person, were being carried by the defendant in pursuance of a contract to which the plaintiff was not a party. In both cases the plaintiff was availing himself of the defendant's services. It was in such circumstances very reasonably held or suggested that the plaintiff could not avail himself of the defendant's services or enter upon structures in the defendant's occupation except upon the terms to which the defendant assented. It was in both cases necessary for the plaintiff to secure the assent of the defendant and the assent was secured by means of a contract containing conditions: the plaintiff could not claim the benefit of the assent and refuse its conditions. In our case the labourer was not availing himself of the landlord's services; he did not seek to enter upon structures in the landlord's possession; and he did not require the landlord's leave and licence (to which, if it had been required, conditions might expressly or impliedly have been attached) to enter upon land in the tenant's possession. In short the above plaintiffs were not utter strangers to the contract between the defendants and the third parties: they obtained an advantage under it. It was emphasised in *Cavalier* v. *Pope*[10] that persons in the position of the labourer *were* entirely strangers to the contract between the landlord and tenant and could claim no benefit from it.

For the conclusion that, the tenant being barred, the labourer also was barred, Greer, L.J., and Bennett, J., relied, not upon the above cases but upon the two following statements: the first taken from the judgment of Erle, C.J., in *Robbins* v. *Jones*[11]: "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term, for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any." The second is taken from Lord Esher, M.R.'s, judgment in *Lane* v. *Cox*[12]: "There is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant there cannot be a duty to a stranger." As is noted by the Court, the first of these statements was expressly, the second perhaps impliedly, approved by Lord Macnaghten in *Cavalier* v. *Pope*.[13]

The three cases cited *Robbins* v. *Jones*,[14] *Lane* v. *Cox*,[15] and *Cavalier* v. *Pope*,[16] are distinguishable from our case upon this most important point:

[8] [1933] P. pp. 154, 174, 178–183; and the *Elder Dempster* case [1924] A.C. 522 there cited.
[9] (1937), 53 T.L.R. 254.
[10] [1906] A.C. 428.
[11] (1863), 15 C.B.N.S. 221, 240.
[12] [1897] 1 Q.B. 415, 417.
[13] [1906] A.C. 428, 430
[14] (1863), 15 C.B. NS. 221.
[15] [1897] 1 Q.B. 415.
[16] [1906] A.C. 428.

namely in those cases the landlord was *not in possession* or control of the dangerous structure at the time of the accident, whereas in our case the lordlord undoubtedly had possession and control of the beech. Indeed in *Cavalier* v. *Pope*, as I understand it,[17] the House of Lords exempted the landlord only because they held that he could not in any sense be said to have had control of the dangerous structure there. Professor Winfield[18] has already noted that the landlord's exemption under this doctrine is conditional upon his not being in occupation; and the importance of this condition is emphasised by cases such as *Bromley* v. *Mercer*.[19] Moreover the person injured in the above three cases *had entered* upon the dangerous premises, whereas in our case the labourer was lawfully upon *land adjoining* the dangerous structure.

The primary remedy, if any, of a person injured by and on dangerous premises is in tort against the occupier.[20] If the landlord is not in occupation, the person so injured can, it is said, sue the landlord only upon a duty, if any, arising out of contract: because fraud apart there is as regards persons on dangerous premises not in his control and injured by them, 'no law' (i.e. no tortious duty) binding the landlord. The basis of the landlord's exemption is that his liability there if any is *exclusively* in contract. Lord Esher, M.R.,[21] in the passage above cited makes it clear that he is discussing only the duty "imposed upon a landlord *by his relation to his tenant*"; that is, by contract. Of course, *if* the duty is exclusively in contract, the tenant's invitee not only cannot have a better claim than the tenant the contracting party, but in fact has no claim at all against the landlord, even though the tenant has a claim: for the landlord can be sued only in contract, and the tenant's invitee, being a stranger, cannot sue on that contract at all.

I do not venture here to dispute the doctrine that the liability of a landlord *out of occupation* to a person injured by and on the dangerous premises arises, if at all, exclusively from contract: it is common knowledge that *Cavalier* v. *Pope*,[22] which has been taken, perhaps improperly, as establishing that doctrine, has been repeatedly and to my mind cogently criticised. The case itself remains to be explained in the light of *Donoghue* v. *Stevenson*[23]; and some of the deductions from the doctrine obviously suffer from the fallacy, there finally exposed, that because a *contractual* duty is or is not owed to X no *tortious* duty can be owed to any person other than X. But it would, I think, be generally agreed that *Cavalier* v. *Pope* in its present unexplained state ought not to be extended to cases which, as decided, it does not cover; and it is respectfully submitted that it does not cover our case.

It does not cover our case, because in our case the essential basis of the doctrine that "fraud apart, there is no law," i.e. no tortious duty cast upon the defendant, is lacking. There indubitably is a law, a *tortious duty* to take care not to maintain *in one's control* and possession dangerous premises which cause damage to "neighbours" upon adjoining land. Bennett, J., recognises this general tortious duty: in his opinion our defendant *is* liable in tort, but for the lease. Whereas the basis of Erle,

[17] [1906] A.C. 428. See especially the judgments of Lord James and Lord Atkinson.
[18] Textbook of the Law of Tort, p. 588.
[19] [1922] 2 K.B. 126.
[20] See e.g. *Salmond on Torts*, 9th ed., § 131.
[21] Above note (12).
[22] [1906] A.C. 428.
[23] [1932] A.C. 562.

C.J.,[24] and Lord Esher, M.R.'s,[25] judgments above cited is that the defendants there *are not* liable in tort or contract, but for the leases. It is true that the general tortious duty can be ousted as regards particular neighbours by agreement: if a particular neighbour agrees to assume the risk, certainly *he* cannot sue if he be damaged by the incidence of the danger. The most that *Cheater* v. *Cater*[26] decides is that by taking a lease the tenant, as for himself, agrees to assume the risk of existing dangers unless the lease expressly provides for the contrary.

In our case the labourer was a neighbour lawfully upon adjoining land, and the landlord undoubtedly had control and possession of the dangerous tree. As controller of such tree he owed a general tortious duty to neighbours on adjoining land to take care not to cause them damage by means of that tree. There was no contract between the landlord and the labourer under which the landlord might claim immunity against the labourer; the labourer was utterly a stranger to the lease between the landlord and the tenant, and being upon adjoining land, he did not require to obtain the landlord's leave and licence (which if required might have been given upon condition express or implied of immunity). The landlord was being sued not as landlord upon a duty exclusively arising from contract but as occupier upon a duty owed generally by law. Why should not the landlord be liable to the labourer in *these* circumstances? There is nothing in the three cases cited to bar the remedy; and the whole weight of the law seems to be in its favour.[26a]

It would be regettable if this case is construed as casting any doubts upon *Cunard* v. *Antifyre Ltd.*[27] in which the landlord in occupation was held liable to an adjoining tenant's licensee. Greer, L.J.,[28] states that the attention of that court was not "called to the distinction which in law exists between the liability of the occupier of property to an adjoining owner and his invitees or licensees and the liability of such an owner to his tenants of part of his estate and his [?their] invitees or licensees." That Court had relied upon *Donoghue* v. *Stevenson*[29]; and it is very respectfully suggested that where a landlord continues in occupation and control, *Donoghue* v. *Stevenson* is more apt and more reliable as an authority than *Cavalier* v. *Pope*.[30] Moreover the present Court seems not to have had its attention sufficiently called to the distinction between the liability of a landlord in occupation and that of a landlord out of possession.

Although Mackinnon, L.J., expressly reserved his opinion upon the point above discussed, the plaintiff was refused leave to appeal to the House of Lords. It is a pity that the House of Lords was not afforded an opportunity of reviewing the law relating to the liability of landlords which is at best in a tangled confusion. And it is idle to speculate whether there might have been judgment for the plaintiff on appeal. For though the *ratio decidendi*

[24] Above note (11).
[25] Above note (12).
[26] (1918), 1 K.B. 247; above note (3).
[26a] It would take us too far afield to discuss here whether the landlord can be considered as having delegated to the tenant the duty of preventing damage arising from the beech. The better view is that even if the landlord had so delegated his duty, he would not have avoided liability to the labourer. In any case it would be unreasonable to distinguish a delegation arising from lease and one arising from sale. As limited to leases, the Court of Appeal's proposition seems particularly difficult.
[27] [1933] 1 K.B. 551.
[28] 54 T.L.R. 557.
[29] [1932] A.C. 562.
[30] [1906] A C. 428.

common to Greer, L.J., and Bennett, J., was that the labourer could not have sued the landlord, the actual plaintiff was the tenant seeking an indemnity from the landlord under Section 30 of the Workmen's Compensation Act, 1925, in respect of the compensation paid by the tenant to the labourer. The tenant *could not* recover an indemnity from the landlord *unless* the landlord were liable to the labourer; but under *Cory* v. *France Fenwick and Co. Ltd.*,[31] cited by counsel but not referred to by the court,[32] the tenant might lose his right to an indemnity by his own default even if the labourer had had a remedy against the landlord; and *non constat* that the tenant as well as the landlord was not in default in failing to make the beech secure.

(2) Granted the existence of a duty of care, the second point arising is whether the landlord has in fact been negligent. Greer and Mackinnon, L.JJ., held that he had not been negligent; Bennett, J., dissented somewhat emphatically. The question is no doubt partly a question of mere fact; but it also involves, as I think, an important question of law; and that is, what do we mean by negligence in this context?

For the purpose of this point, it is necessary to add to the detail of the facts as follows. The defendant's (the landlord's) estate was a very large one, the tree population of which, excluding young plantations, amounted to 56,000. The trees had been much neglected since the War, with the result that in February, 1936, "there were thousands of dead and dying trees on the estate." The defendant entered into possession on 10th February, having then bought the estate from his predecessor in title who had granted the lease of the farm to the tenant the plaintiff. From 9th March onwards, the defendant's agent intermittently employed two men to fell. On 20th March a tree expert looked at the trees and on 18th April submitted a preliminary report. On 5th May the expert was instructed to prepare a scheme. On 12th May he went down and began a survey which lasted three weeks. During the survey, on 30th May, the branch of the beech fell and injured the labourer. The expert's second report was dated 26th June. The beech fell about three and a half months after the defendant first entered, but it was admitted that "it would have been impossible to deal with all the thousands of dead and dying trees between 10th February and 30th May." As the expert, no doubt feelingly, said, "The great difficulty was there were so many it was difficult to know where to begin."

Bennett, J.,[33] was of opinion that the expert was concerned to improve and develop the estate "from an amenity, a shooting and a timber producing aspect." In his opinion, until the accident "they (the defendants) never realised that they were under any duty to their neighbours and so never at any time considered how to deal with dangerous trees growing along their boundaries" from that point of view. The majority believed that they had been "alive" to the possible *danger* arising from trees and had behaved reasonably in dealing with it. "What more," asks Greer, L.J.,[34] "could the defendants be expected to do in the exercise of reasonable care than to take the advice of a forestry expert as to the best method of dealing with the dangerous trees and then leave it to the expert to see that his advice was carried out?" The more which the defendants could have

[31] [1911] 1 K.B. 114.
[32] But see Bennett, J., 54 T.L.R., p. 559.
[33] 54 T.L.R., p. 560.
[34] 54 T.L.R., p. 557.

been expected to do, in the exercise of reasonable care *towards the labourer*, was, it might be suggested, either to warn him or to make the beech safe; and a reasonable man, concerning himself with the labourer and the beech, could in three and a half months' time easily have done either or both. Mackinnon, L.J.,[35] supposes that others of the dead and dying trees were more likely to fall than this beech, that if *they* had fallen and caused damage a charge of negligence against the defendants for not having felled those trees could have been made with as much, indeed with more force than here, and that therefore the defendants behaved reasonably in dealing first with the other trees.

No doubt the defendants behaved reasonably and with some diligence, from one point of view. As the majority found, they were not entirely supine as regards *all* dangerous trees. It was in *their own* interests provident to deal first with the trees more likely to do damage and therefore more likely to involve them in expense. But is a defendant to be excused as regards a particular plaintiff because the defendant is causing more urgent danger to other possible plaintiffs? Supposing that I leave two cars unlighted upon the highway, one upon a busy road and another in a side lane; and recollecting that I have so left them, I bestir myself to attend to the one on the road. Can I defend myself against a person injured in the lane by proof that I was busily engaged upon the car on the road, and that a more expensive accident was more likely to happen on the road? No doubt I am in some sense being diligent and prudent; but negligence does not consist barely in a state of mind, it consists in an objective though unintentional or undesired failure to attain a standard of conduct which is prescribed by law.[36] It cannot be contended that my objective negligence in leaving a car unlighted upon the highway magically ceases when subjectively I become "alive" to the danger and start doing something about it: my negligence subsists even while I am running to turn on the lights, and continues until I have actually done so.

The defendant's liability in respect of boundary trees is admittedly not absolute: he is not an insurer, warranting their safety in any event. But he has a duty as regards every particular tree; and the duty suggested is to make that tree safe if a reasonable man should have known that it was unsafe and could, by applying the objectively proper standard of care[37] *to that tree*, have made it safe. If the defendant had been a poor man owning only that beech and had made the tree safe to the best of *his* judgment and as well as *his* other business allowed, undoubtedly the defendant would have been liable[38] if a reasonable man should have known that the tree was *still* unsafe. The objective standard of duty cannot be different in the case of a rich corporation, simply because the corporation happens to own 56,000 other trees. And whatever experts it may have called in, the corporation by itself or by its agents and experts had in three and a half months done nothing at all to secure the beech.

[35] 54 T.L.R., p. 558.

[36] For this proposition which to-day perhaps is obvious, see e.g. *Salmond on Torts*, 9th ed., § 120 *ff*. See also the recent statement by Boyd-Merriman, P. in the *Manchester Regiment*, [1938] P. 117, citing *McCrone* v. *Riding* 54 T.L.R. 328.

[37] What that may be, I do not venture to affirm. Is the duty one to make the tree as safe as reasonable skill and care can make it, or is it sufficiently discharged if a competent independent contractor is employed to deal with the tree, even though he deal with it negligently? Probably the occupier is liable for the independent contractor's negligence; but liable or not for that, the occupier is at least under a duty to see that some competent person does actually deal with a boundary tree which is obviously dangerous. In our case nobody dealt or attempted to deal with the beech.

[38] *Vaughan* v. *Menlove* (1837), 3 Bing N.C. 468.

In the case above put of cars on the highway, my duty with regard to the cars arose no doubt from my previous default in leaving them there unlighted. The defendant's duty with regard to the beech arose not from his previous default but from his entry into possession[39] of an estate with a neglected beech upon it. Can that make a difference? The defendant by his entry was in a quandary; but he voluntarily put himself into that quandary. He no doubt paid less for the estate than he would have done if it had not been "very much neglected for many years." By entering in the existing circumstances he personally assumed the risks and duties arising from those circumstances. He was at liberty to do so if he judged it prudent in his own interest; but he ought not to be at liberty, when one of the potential risks which he assumed has become actual, to shuffle out of his liability by pleading that he or an agent of his was perhaps busily performing other duties which he had concurrently assumed.

To determine whether the defendant has been negligent as regards the beech, the question (it is very respectfully submitted), is not "Has the defendant bestirred himself somewhat about dangerous trees in general?" nor even, "Was the defendant alive to the danger caused by the beech?" but rather, "Has the defendant objectively shown with regard to *this* beech that skill and care which a reasonable person would have shown?" And the reasonable person who provides the objective standard, whoever he may be, is neither a corporation which has voluntarily put itself into the quandary of dealing simultaneously with many thousands of dead and dying trees nor an expert bewildered by the multitude. When it is proved or admitted that the beech, if not known to be dangerous, would have been revealed as dangerous by any ordinary inspection and that in three and a half months it could easily have been made safe, the answer to the question so framed is not, I think, in doubt.

A final point arises: what is to be taken as the *ratio decidendi* of the Court of Appeal as a Court? A proposition touching the meaning of negligence? A rule as to the liability of landlords in possession? Or both? Or neither? It is respectfully suggested that *Shirvell* v. *Hackwood Estates, Ltd.* can safely be taken as authority only for the proposition that upon all the facts of the case the plaintiff for reasons upon which the Court could not agree failed to persuade the court that he was entitled to the remedy he was claiming.

C. J. Hamson.[40]

[39] The duty certainly arises from entry in cases of continuing nuisance, even though created by others before entry (see e.g. *Broder* v. *Saillard* (1876), 2 Ch.D. 692, and Salmond *op. cit.* s. 57 (2) and (3). There is no reason to suppose that a duty does not similarly arise in the case of dangerous trees). On the question whether a duty arises, it is surely immaterial if the action is in nuisance or, as here, in negligence; though the form of action may affect the *extent* of the duty.

[40] Mr. Hamson is a Fellow of Trinity College and a University Lecturer in Law at Cambridge.

MODERN PERILS TO THE COLLECTING BANKER

When is a banker deemed to be guilty of negligence within the meaning of s. 82 of the Bills of Exchange Act, 1882? This section, it will be remembered, enacts that "where a banker, in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

To the question asked it is, in the present state of the authorities, impossible to give an answer, for, to quote Lord Wright, in *Lloyds Bank* v. *Savory*[1]: "In each case negligence must be a question of fact in the particular circumstances." Consequently the best one can do is to consider the decisions arising on the section; though it is cold comfort to a banker who is seeking to protect his interests to be told: "In circumstances such as these you will be guilty of negligence, but that does not mean that in other circumstances which may arise you will not be held guilty of negligence."

It is not intended in the present article to review all the authorities in which the word "negligence" in the section quoted has been considered. That would be beyond the limits of space available in many numbers of this Review. But some recent decisions present an opportunity for a further consideration of the section.

Before dealing with these decisions, however, it may be useful to refer to the genesis of the section and consider what was the attitude of the Legislature at the time when the section was first enacted. Not that it is open to a Judge interpreting the section to do so, but an inquiry into the attitude of the Legislature is useful in determining whether from the commercial, as distinct from the strictly legal aspect, the section has been interpreted in accordance with the intentions of its framers.

The section first appeared in the Crossed Cheques Act, 1876. During the debates on the Act, the word "negligence" was scarcely adverted to, the only mention being in the Attorney-General's explanatory speech, when he explained the protection which bankers would receive "unless they should be proved to have acted with negligence."[2] Other members of both Houses sought no explanation of the meaning of the word as it appeared in the Bill. The section was repealed by and, with merely verbal alterations, re-enacted in the Bills of Exchange Act, 1882. Again in the passage of the Bill through Parliament, the word round which so many legal battles have raged was not considered.[3] Certainly no attempt was made in either Act to define the word and consequently judges were left with a clean sheet on which, it is suggested with respect, they have made several blots. With the passage of time the blots have grown larger until now, to the banker, they assume the form of an ominous cloud. Two, at any rate, of the three decisions to be discussed have been the cause of much perturbation in banking circles.

Lloyds Bank v. *Savory*[4] arose out of an ingenious fraud committed by

[1] [1933] A.C. 201 at p. 223.
[2] See Parl. Deb., Vol. ccxxxi (3rd ser.), p. 1215.
[3] See *ibid.* Vol. cclxxii (3rd ser.), pp. 833 and 1671.
[4] [1933] A.C. 201.

two clerks in the employ of the respondents, a firm of stockbrokers. The respondents signed cheques in payment of jobbers' accounts. These cheques, in accordance with a Stock Exchange rule, were crossed and made payable to bearer. One of the clerks, P, had an account with a country branch of the bank and Mrs. S, the wife of the other clerk, had an account at another country branch. The manager of the first branch knew that P was a stockbroker's clerk, but did not know who his employers were. The manager of the second branch knew nothing of S. When the respective accounts were opened the customers gave references which appeared to the managers to be satisfactory. P had been introduced by another stockbroker's clerk whose firm was unknown to the manager, but whose name frequently appeared in the local newspapers as a footballer. Mrs. S had been introduced by her landlady but no inquiry had been made regarding her husband. P and S both stole cheques drawn in favour of jobbers and handed them in at the head office or London branches of the bank, making out paying-in slips directing payment to be made to the credit of the accounts at the country branches. The paying-in slips were sent to the branches, but no mention of the names of the drawers of the cheques appeared on them. One of the bank's rules provided that no new account should be opened without knowledge of or full inquiry into the circumstances and character of the customer. There was also a rule, unwritten but generally recognised, that banks do not take payments in, without inquiry, of cheques drawn by a firm in favour of a third party and paid in by a person other than the payee who is or ought to be known to be an employee of the drawing firm.

In an action by the respondents against the bank for conversion, the House of Lords (Lords Buckmaster, Warrington of Clyffe and Wright; Lords Blanesburgh and Russell of Killowen dissenting) held that the bank's practice was defective in that the branch which received the cheques in the first instance never informed the crediting branch of the names of the drawers of the cheques and that the managers of the country branches had omitted to make sufficient inquiries when accepting P and Mrs. S as customers. The bank had therefore failed to prove that they had acted without negligence within the meaning of s. 82.

The decision cannot be accepted with equanimity. Granted that the omission on the part of the bank so to conduct its business that the country branches knew nothing of the nature of the cheques paid into the receiving branches amounted to negligence, it is difficult to see how any other system would necessarily have resulted in the loss which was sustained being avoided. If the country branch managers, on the opening of the accounts, had made inquiries as to who the employers of P and S were they would not, of necessity, have been in a position to obey the bank's unwritten rule during the whole of the period of the accounts; for the clerks might have changed their employment. And nowhere in the judgments is there any suggestion that it is the duty of a banker to inform himself of the names and occupations of such of his customers as are in employment. Indeed it is impliedly conceded that no such duty exists. In argument the present Master of the Rolls (then Mr. Wilfrid Greene) pointed out that a clerk might be in one firm's employment when he became a customer and in that of another firm when the question of his employer became material. But Lord Wright said: "Nor does a precaution cease to be proper for the pur-

[5] At p. 233.

poses of s. 82 merely because, though generally effective, it may in special circumstances be ineffectual." In other words, that it is the bank's duty to ascertain the facts concerning a customer's employer when the account is opened even though, should the customer change his employment, that information would be of no use for the purpose of ensuring that the customer did not pay into his account third-party cheques, drawn by his employer, without inquiry.

While it is conceded, too, that "in each case negligence must be a question of fact in the particular circumstances,"[6] it is surely the business of the Courts, in particular of the highest tribunal, so to frame their decisions as to direct the attention of bankers to the safeguards they should employ to protect their interests and so to prevent fraud. But, at the same time, these safeguards must not be such as to put a stranglehold on business.

But reduced to simple terms, *Savory's Case* decides that (*a*) on opening an account, a banker must inquire whether his customer, or, in the case of a married woman, the customer's husband, is in employment, and, if so, who his employer is; (*b*) that if credits are paid in at one branch for an account at another branch, the latter branch must be informed of the nature of the cheques paid in so that, in appropriate circumstances, inquiry can be made; *but* (*c*) no duty is cast on a banker of informing himself of any change of employment of the customer or the customer's husband, as the case may be.

Hence, while an additional duty was cast on bankers, the House of Lords did not show the way towards a complete remedying of the defects in the banking system which enabled the frauds to be perpetrated. There is a good reason why they did not take this last step: to have done so would have cast on bankers a burden which would have been intolerable. In all previous cases on negligence within the section, the Court, while declaring a particular line of conduct to be negligent, has shown that the fraud in question would unquestionably have been avoided by a different method of business. In the instant case, the House of Lords failed to do this.

From the commercial standpoint the matter was put in its proper perspective in the dissenting opinion of Lord Blanesburgh who said[7] (referring to the case of Mrs. S.): "In these days of emancipation when female clerks, married as well as single, abound, a decision [that the bank's failure to make inquiries regarding Mrs. S's employment constituted negligence] is in danger of being invoked as authority for the proposition that when a man known to be married applies to a bank to open an account, the bank is negligent if it refrains from making similar inquiry with regard to the wife—a proposition that still strikes me as extravagant." With respect, it is a pity that this view did not commend itself to the majority of their Lordships.

Little need be said of *Carpenters Company* v. *British Mutual Banking Co.*[8] A clerk in the employ of the Carpenters Company who had charge of the financial affairs of one of the Company's charitable homes, obtained from the Company properly signed crossed cheques payable to tradesmen who had apparently supplied goods to the Home. He either forged the endorsements or, to try and allay suspicion, went to the bank with someone he represented to be the payee and got that person to forge the payee's

[6] *Ibid.*
[7] At p. 219.
[8] (1937), 156 L.T. 175.

signature. In either case the cheques were paid into the clerk's account at the bank. In his evidence one of the defendant's cashiers said that five, ten, or fifteen years before he had called the attention of the then manager to the frequency with which cheques of which the clerk was not the payee were being paid into the clerk's account. It is not known what the manager did as the result of this information, but the frauds continued. It is not surprising that Branson, J., held the bank to be guilty of negligence. Whether his decision would have been the same in the absence of the cashier's evidence, is, of course, an open question.

The latest authority on the point under discussion is *Motor Traders Guarantee Corporation* v. *Midland Bank*.[9] T, a motor trader, had an account with the bank. He persuaded the plaintiffs, a hire-purchase finance company, to hand him a crossed cheque, marked "not negotiable," drawn by them in favour of W. and Co.—a firm, not a limited company. T forged the endorsement of W. and Co. and, having added his own endorsement, paid the cheque into his account at the defendant bank. When he paid the cheque in, T was asked by the cashier if he had obtained the cheque from W. and Co. and he replied in the affirmative. One of the Bank's regulations required that, before accepting cheques for the credit of some person other than the payee, cashiers should refer the matter to the branch manager. But in the present case the cashier neglected to do so. The cashier saw from an inspection of T's account that there had been considerable dealings between him and W. and Co., and T volunteered information which led the cashier to believe that he had come by the cheque honestly. A further inspection of the bank's books would have disclosed to the cashier that during the operation of the account many cheques drawn by T had been dishonoured or only honoured after repeated presentation. In an action by the plaintiffs for conversion, Goddard, J., held that the defendants had been guilty of negligence in not making further inquiries having regard to T's past banking history.

If this decision is allowed to stand it will go far towards depriving cheques of their element of negotiability, for it means, in effect, that whenever a crossed cheque is paid into the account of a person other than the payee, the bank will have to make inquiries into its origin and, even if satisfied with the customer's replies to those inquiries, will have to consider the workings of the customer's account before accepting the cheque. Consequently, either banks will have to refuse to collect third party cheques, or, if they continue to do so, then, in the words of an eminent authority[10]: "There will be a queue in front of the bank's counter like that outside a popular theatre on a first night"; ordinary banking business will thus be paralysed. It is a little difficult to understand why the learned Judge should have laid so much stress on the fact that cheques on T's account had been returned. Such inquiries as bankers are required to make in order to obtain the protection of s. 82 are, presumably, to obviate frauds. But, in general, there is nothing fraudulent in having cheques returned because of a temporary insufficiency of funds. At the worst it denotes an unjustified optimism, which, fortunately, is not criminal. But, in future, to have a cheque returned will warrant placing the customer's name on the list of suspected persons.

Another point of interest in the decision is that Goddard, J., rejected the plaintiff's argument that negligence had been established because the

[9] [1937] 4 All E.R. 90; 54 T.L.R. 10.
[10] Sir John Paget, K.C. in (1928) 49 *Institute of Banker's Journal*, at p. 235.

bank's own regulations had been disobeyed. The learned Judge said[11]: "If the facts show that the bank cashier had taken every reasonable precaution to satisfy himself, and that he was satisfied with the information he had got, and that the conclusion he had been able to draw from that information was such as would satisfy anyone that the bank might safely and properly take that cheque, I do not see how it can be said that, because he had not followed out to the letter the regulations of the bank . . . the bank would have been guilty of negligence." Hereon the learned Judge does not seem to have considered the bank's regulations such an important factor in the case as did the Law Lords in *Savory's Case* (*supra*). It is submitted, with respect, that the opinion of Goddard, J., is to be preferred. The bank's internal rules are intended to regulate the conduct of its business and not to set forth its standard of duty to the outside world. Were it otherwise, banks would find themselves compelled to revise their regulations so as to ensure greater protection to themselves with probably a lessened protection to the public at large.

In the course of his judgment the learned Judge made certain suggestions as to the nature of the further inquiries which the bank should have made. He said[12]: "Before the cheque was put through for clearing, I should have thought it would have been quite simple to have rung up and asked if the cheque was in order or to have asked the drawers of the cheque whether it was in order. An inquiry might have been made of W. and Co." But it is submitted, with respect, that had the bank made such inquiries it would have been guilty, had T been rightfully entitled to the cheque, of a breach of the duty of secrecy which it owes to its customers, the extent of which is laid down in *Tournier* v. *National Provincial and Union Bank of England*.[13] In that case the duty of banker was said to be "not to divulge to third persons, without the consent of the customer, express or implied, . . . any information relating to the customer acquired through the keeping of his account unless . . . the protection of the banker's own interest requires it." In circumstances such as those occurring in the instant case the bank, from a legal standpoint, finds itself in a dilemma. If the customer has no title to the cheque and the bank does not make sufficient inquiries which, according to Goddard, J., should be made directly of third parties, it is guilty of negligence. If the customer has a good title to the cheque and the banker does make inquiries of this nature, thereby divulging information relating to the customer, he is guilty of a breach of the duty of secrecy, for, *ex hypothesi*, it cannot be said that the disclosure was made in the banker's own interests if there was no need for any inquiries.

It is not known whether bankers are contemplating any steps towards remedying the situation disclosed by the cases discussed above. But, until they do so, they will, in order to protect their interests, "be bound to act as detectives, go in search of suspicious facts and ask questions of a customer on the footing that he may be or become, a thief."[14]

A. G. Davis.[15]

[11] [1937] 4 All E.R., at p. 94.
[12] [1937] 4 All E.R., at p. 96.
[13] [1924] 1 K.B. 461.
[14] Wilfrid Greene, K.C., in argument, in *Savory's Case* (*supra*).
[15] Dr. Davis is head of the Law School, University of South Wales, Cardiff.

FURTHER NOTES ON THE EFFECTIVENESS OF ABORTION LEGISLATION

Since the publication of the paper on abortion legislation, in the previous issue of the MODERN LAW REVIEW, some additional information on the position in Germany and Norway has been received by the writer.

As regards Germany, a letter from the Ministry of Justice states that the recent increase in the number of prosecutions for abortion is due to the fact that since 1933 the law has been applied with special vigour. In particular police drives (*mehrfach Sonderaktionen*) have led to the discovery of a large number of "abortion centres" (*Abtreibungsstellen*) which, under the pre-1933 practice of investigating only those cases which were brought

GERMAN STATISTICS, 1930–1937

	Number of Persons Accused	Number of Persons Receiving Sentences	Number of Persons Receiving Sentences and Disciplinary Treatment*	Number of Persons Acquitted	Proceedings Discontinued	Other Results	Number of Persons Accused	Number of Persons Receiving Sentences	Number of Persons Receiving Sentences and Disciplinary Treatment*	Number of Persons Acquitted	Proceedings Discontinued	Other Results
	[A]						[B]					
1930 .	67	52	–	13	2	–	4111	3628	–	444	19	20
1931 .	87	72	–	14	1	–	4180	3703	–	428	37	12
1932 .	73	63	–	9	1	–	4510	4023	–	444	28	15
1933 .	64	50	–	13	1	–	4104	3615	–	446	36	7
1934 .	38	14	–	19	4	1	4669	4146	2	477	26	18
1935 .	29	22	1	3	3	–	2541	2280	2	244	9	6
1936 .	19	16	–	3	–	–	3517	3109	9	364	28	7
1937 .	11	8	–	3	–	–	5741	5118	8	561	41	13
	[C]						[D]					
1930 .	157	140	–	17	–	–	10	8	–	2	–	–
1931 .	175	165	–	9	1	–	10	9	–	1	–	–
1932 .	201	190	–	10	1	–	7	5	–	2	–	–
1933 .	192	184	–	8	–	–	6	3	–	2	1	–
1934 .	396	344	28	15	2	7	7	6	–	–	–	1
1935 .	488	437	25	18	1	7	6	5	–	1	–	–
1936 .	442	387	32	16	4	3	10	8	–	2	–	–
1937 .	618	555	40	22	1	–	3	3	–	–	–	–

[A] Public display of objects intended for "lecherous" (*unzüchtigem*) uses—paragraph 184, clause 3.

[B] Abortion or killing of foetus—paragraph 218, sections 1–3.

[C] Abortion with a view to profit, or participation therein—paragraph 218, section 4, clauses 1 (second half) and 2.

[D] Abortion or killing of foetus without consent of the pregnant woman—paragraph 218, section 4, clause 1 (first half).

Under the new paragraph 219 of the Penal Code—applied in 1933—only 6 persons have so far been prosecuted—1 in 1934 and 5 in 1935—and 4 of these were found guilty.

* The term is *Strafe und Massregel*, and provides not only punishment for the offence but also action to protect society against the guilty person, e.g. "protective custody."

to the attention of the authorities, necessarily remained unknown. The letter adds that although there has been a large number of abortion cases, the frequency of criminal abortion has decreased to a considerable extent under national-socialism. The table on page 227 shows the position in Germany in recent years.

A recent decision by a German court (*Schöffengericht*) in Lüneburg is of considerable interest. According to the *Frankfurter Zeitung* (*Reichsausgabe*) of November 13th, 1938, a Jewish woman who, having cohabited with a Jewish man, had attempted to procure an abortion, was nevertheless acquitted by the court. The reason given for this decision was that since the National Socialist revolution, Paragraph 218 was really a provision for protecting the progeny of the "aryan" German race, and could not therefore be applied to protect the progeny of a race which was opposed to the German people. The German people was defending itself against the Jewish race, and laws passed for the German people could not be used for the protection of Jews. This decision has to be confirmed by a higher court before it can be applied generally in legal interpretation, but its importance is evident, and other branches of the penal law may well be affected by it.

As regards Norway, Dr. Gerda Evang writes that, in her opinion, abortion is much more frequent in the towns than in the country-side, in spite of the fact that reliable birth control methods are not used to a great extent in the country-side. She also points out that the abortion frequencies given for the Oslo birth control clinic cover all abortions—that is, they apparently include spontaneous as well as induced abortions.

Finally, two errors in the previous paper should be noted. On page 109, footnote 53, the words "2nd reading" should be omitted. On page 115, continuation of footnote 70, the words "Section 14 of" should be inserted in the sentence in brackets, beginning "Note that Article 2 . . .," and the sentence should therefore end ". . . within the meaning of Section 14 of the Act." The second bracket is out of place, and should have been inserted at the end of the footnote, after the word "consent."

D. V. Glass.

STATUTES

The Infanticide Act, 1938

To complete the story told in the article on "Child-killing in English Law" in the first volume of this Review (pp. 203, 269), it may be useful to note that Lord Dawson's Bill, to which reference was made on p. 287, has now become law. His Lordship piloted the Bill through Parliament with great enthusiasm and skill and he is to be warmly congratulated on his success where others had failed to procure an amendment of the law. We trust that it implies no want of due modesty if we record that Lord Dawson has expressed his appreciation of the help he derived from the MODERN LAW REVIEW.

The Act (1 & 2 Geo. VI, c. 36) repeals and re-enacts with modifications the Infanticide Act, 1922. Section 1 provides that the offence of Infanticide is committed "where a woman by any wilful act or omission causes the death of her child *being a child under the age of twelve months*, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child *or by reason of the effect of lactation consequent upon the birth of the child.*" The amendments of the existing law are indicated by the words which we have italicised. Instead of the upper limit of three weeks or a month imposed upon the reforms of the 1922 Act by the Court of Criminal Appeal in *R.* v. *O'Donoghue*, 20 Cr.App.R. 132 we now have the limit of twelve months, which should cover all but very exceptional cases of post-natal derangements. The extension of the scope of the reforms to cover the effects of lactation is also new. The Act provides, as the 1922 Act did, that a verdict of infanticide may be returned on a trial for murder. Similarly, it enacts that nothing in it is to affect the power of the jury upon an indictment of murder to return a verdict of manslaughter, or a verdict of guilty but insane, or a verdict of concealment of birth. In connection with the latter offence, it is of interest to observe that the proviso to s. 60 of the Offences against the Person Act, 1861 (which provides for the alternative verdict of concealment on an acquittal on a charge of murder) is affected by this Act. It enacts "that for the purposes of the proviso to that section a child shall be deemed to have recently been born if it had been born within twelve months before its death." In connection with the discussion of Mr. R. S. Wright's explanatory memorandum on the Draft Criminal Code for Jamaica, references were made in the article on child-killing in this Review (Vol. 1, at pp. 274–5) to the doubts which had been raised on this and other points arising out of s. 60. It is noteworthy that this new definition of the words "the child had recently been born" in s. 60 appears to be made for all purposes and not merely for the purpose of an alternative verdict of concealment upon the acquittal of a woman upon an indictment for infanticide, for the sub-section of the Act dealing with the latter subject follows the sub-section dealing generally with alternative verdicts upon an indictment for murder. In view of the express enactment contained in the Children and Young Persons Act, 1933, s. 1 (4), it was unnecessary to re-enact in this Act the provision in the 1922 Act relating to the substitution of a verdict of cruelty to a child on an indictment for infanticide and the provision has accordingly been omitted.

D. R. S. D.

The Finance Act, 1938

The chief justification of a taxing act is that it should levy taxes as fairly as may be from each class of the community according to its means; the appropriate division between direct and indirect taxation is solely a matter for the economist and will not be dealt with here. This year's Finance Act, like those for the two previous years, is primarily devoted to stopping up the loopholes of legal evasion whereby those who can well afford to pay are enabled to escape the share of taxation appropriate to their true incomings. It will be remembered that, just before the introduction of the 1938 Budget, an apparently inspired Press campaign was waged against "legal evasion" and its unhealthy effects on the commonweal; reference might also be made to the writer's remarks on this topic at 1 M.L.R. 292/3.

The parts of the Act dealing with Customs and Excise and Estate Duty are comparatively unimportant; the bulk of the Act is devoted to Income Tax which is dealt with in three parts of which the last two relate to legal evasion. As everyone knows, the standard rate of income tax was raised to 5s. 6d. in the £, the rates of surtax being left unchanged; in the case of trading concerns this increase was, in part, offset by an increased allowance for depreciation while special provision was made for exempting the annual value of A.R.P. works. A long-standing injustice was remedied by a provision placing the father, who articled or apprenticed his son, on the same footing as one who sent his child to a University, both now being granted the same allowance. Other sections are aimed at the evasion of tax where the right to receive dividends, etc. is sold without the securities (*Paget* v. *Inland Revenue*, [1938] 2 K.B. 25 or where funding bonds are issued in lieu of interest (*Cross* v. *London Provincial Trust Ltd.*, [1938] 1 K.B. 792), and also against the growing practice of closing down a business and selling the stock-in-trade to the successor otherwise than in the ordinary course of trade whereby the difference between the cost and realisation prices becomes a capital profit and therefore not taxable.

The evasion clauses occupy more than one-third of the Act and are couched in the most involved language; they are divided into two main heads, viz.: Administration of Estates and Settlements. Under the former head the principle laid down in *R.* v. *Special Commissioners, Ex parte Dr. Barnardo's Homes, &c.*, [1921] 2 A.C.1 and *Corbett* v. *Inland Revenue*, [1938] 4 All E.R. 700 has been reversed; these cases held, in effect, that in the case of a residuary bequest the income did not belong, for tax purposes, to the beneficiaries until the residue had been actually and finally ascertained even though they might have received payments on account of such income. Part III of the Act, broadly speaking, applies the rule in *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295 to limited and absolute interests in residue; it is provided that sums actually paid to the life-tenant or residuary legatee shall be regarded as his statutory income for the year of payment and that, on completion of the administration, the residuary income is to be spread evenly over all the years of administration and thus to be regarded, proportionately, as the statutory income for each such year; adjustments of tax liability are to be made for the years concerned without regard to the usual six year's time limit.

Part IV of the Act and the Third Schedule deal with the avoidance of tax by means of trusts and settlements including cases where the settlor's income is returned to him in capital form by the trustees by means of loans

or similar transactions; the language of this part of the Finance Act is abstruse and complicated beyond all reason—this is probably due to specific modes of evasion alone being aimed at. It is once again suggested that a general clause, enabling the Special Commissioners of Income Tax to disregard any transaction which *artificially* reduces a taxpayer's statutory income, would be far more preferable (see hereon 1 M.L.R. 293). The writer has found it impossible to condense these involved provisions in the space available but, broadly, they are aimed at revocable settlements, at those which are irrevocable but where the trustees have made no distributions, and at devices whereby the settlor enjoys the income, settled on others, by means of loans or non-taxable payments by the trustees; provision is made for cases where a chain of companies is interposed between the settlor and the trustees.

As regards National Defence Contribution no attempt has, unfortunately, been made to impose a higher rate of tax on those concerns benefiting directly from re-armament, e.g. aircraft companies, and which are making profits out of all proportion to those made prior to 1935. A loophole, left by last year's Finance Act, is blocked up by Sec. 42 (5) whereby, in the case of all principal and subsidiary companies (as defined by the Act), payments of interest, rent, royalties, etc., are put in the same category as dividends and not allowed as a deduction to the subsidiary company; normally, of course, such receipts were not, and are not, assessable on the principal company.

A. FARNSWORTH.

REPORTS OF COMMITTEES

Parliamentary Privilege—The Sandys Case

The First Report of the Select Committee on the Official Secrets Acts[1] has now been published. It is concerned almost entirely with a detailed elucidation of the facts of the Sandys Case including the question of the responsibility for the Military Court of Enquiry which it will be remembered was specifically referred to it as a result of a number of questions in the House of Commons.

In a note published in the MODERN LAW REVIEW[2] we drew attention to the fact that the Select Committee had given no reasons for their finding that there had been a breach of Parliamentary privilege in the Sandys Case, and suggested that there appeared to be no evidence of anything more than a technical breach having taken place. The Report of the Select Committee does nothing to elucidate this matter and it may be hoped that a debate on the Report will throw more light on the situation.

There are, however, several matters of importance which arise from the Report of the transactions in connection therewith. In the first place it is evident that the Committee appreciate "the great importance of the questions referred to them, which directly affect not only Members of Parliament in the discharge of their duties, but which indirectly concern every individual citizen whose right it is in the last resort to have his grievances ventilated by speech and question on the floor of the House of Commons."[3] So far so good, though as we have already indicated the problem of the Official Secrets Acts is even wider than that referred to the Select Committee.

[1] H.M. Stationery Office, 1s. 6d. net.
[2] Vol. II, No. 2, p. 163.
[3] Report: Part I, para. 2.

Secondly, the Committee pass a somewhat severe criticism, almost in the nature of censure, on the part played by the Attorney-General in the affair. His conduct is well worth attention because it shows how easily the most elementary principles of justice may be violated by an eminent lawyer. The Attorney-General is responsible for prosecutions under the Official Secrets Acts which require his fiat. It would seem therefore to be fairly obvious that he ought not to mix himself up with such matters as the interrogation of a person whom at a later stage he may have to prosecute. The Attorney-General, however, appears only to have awakened to this important aspect of the matter during the course of the proceedings when on the occasion of his second interview with Mr. Sandys he gave him an undertaking not to prosecute. The impression left on the mind of Mr. Sandys after the first interview, however, may be gauged from the fact that he promptly went home and burned a number of incriminating documents lest his residence should be raided by the police. In the opinion of those who wished to present what may perhaps be called a minority report "the conduct of the Attorney-General is to be condemned as a gross violation of the proper and traditional relationship between members of Parliament and Ministers of the Crown."[4]

Thirdly, there is implicit in the Report a criticism of the conduct of the Secretary of State for War. It is clearly the opinion of the Select Committee that as soon as it became known how Mr. Sandys obtained his information—the source being the adjutant of the Anti-Aircraft Brigade in which Mr. Sandys holds a commission—and that there was no danger of its being further disseminated, the necessity for holding a Court of Enquiry ceased. The Secretary of State however while being aware both that the House of Commons was proposing to set up a Select Committee and that the source of Mr. Sandys' information was known nevertheless approved of the order of the Army Council under which the Court of Enquiry was set up. Since it was perfectly obvious that the principal witness before the Court would have to be Mr. Sandys—indeed as soon as it was clear that he would not attend the enquiry was abandoned—the Secretary of State must have contemplated that he would be summoned to attend. It is not therefore possible to escape the conclusion that the breach of privilege which the House found to have taken place was caused by the Secretary of State for War.

Fourthly, attention should be drawn to what has been called the Minority Report. This was drafted by Mr. Lees Smith and received the support of three other members of the Select Committee. A report drafted by the Chairman (Sir John Gilmour) was, however, preferred, and the Minority document was not accordingly presented to the House. It is, however, worth careful study, and it is a little difficult to understand why it was ignored by the Press. This minority report makes plain what could hardly be in question, viz. that the putting down of a question cannot be an infraction of the Official Secrets Act: "under such circumstances no action can be taken against a member of Parliament under s. 2 of the Official Secrets Act. Both questions and speeches in the House of Commons are protected, and to suggest otherwise is to misconceive the nature of Parliamentary privilege."[5] Parliament has, of course, powers of discipline over its own members, and would doubtless punish any deliberate infraction of the Official Secrets Acts.

R. S. T. C.

[4] *Ibid.*, p. lxxviii.
[5] See *ibid.* lxviii.

NOTES OF CASES

Frustration

THE doctrine of supervening impossibility of performance has developed by the gradual establishment of a variety of circumstances to which it can be applied. Difficulties thus arose chiefly out of the struggle over the addition of a new set of circumstances or the definition of recognised categories, and their number is still not fixed nor can they be precisely defined. Thus, doubts have been expressed recently[1] as to the correctness of the decisions in the Coronation cases which established the most comprehensive of these categories, change in circumstances the continuance of which formed the basis of the contract. The question whether the objective facts of a given case justify the application of the doctrine is, however, not the only problem which may arise in connection with frustration. *Tatem* v. *Gamboa*[2] deals with the subjective requirements for the application of the doctrine, requirements relating to the states of mind of the contracting parties.

In this case a British ship was chartered by the Spanish Government for one month to carry refugees from Santander to France. The hire, at the rate of £250 a day, about three times the market rate, was paid in advance for one month. Having made one voyage the ship was seized by the insurgents and not returned to the owners until about five weeks after the expiration of the charterparty. The charterers admitted that, under the rule in *Chandler* v. *Webster*,[3] the owners were entitled to retain the sum paid in advance although the ship had only been available for about two weeks, but they refused to pay hire for the additional period during which the ship had been detained on the ground that the seizure of the ship amounted to frustration of the contract discharging them from their obligation to make any further payments in respect of hire. This contention was upheld by the Court. To arrive at this decision, Goddard, J., had to meet the argument advanced on behalf of the owners that frustration could not be effected by an event which had been contemplated by the parties. It was common knowledge that many ships had been seized by the insurgents and the high rate of hire agreed showed that the risk of capture was appreciated by the parties. Since they had failed to provide that the contract should be discharged in the event of capture they must have been prepared to take their chance on this. A term providing for frustration, however reasonable, could not be implied since it would contradict the intention of the parties.

In reply to this argument Goddard, J., did not agree to the finding of facts upon which it was based. The possibility of seizure and prolonged detention would have been necessarily in contemplation only if a lawful blockade had been established. In view of the ineffective blockade of the Spanish coast carried out by forces which had not been granted belligerent rights and in view of the general uncertainty prevailing as to conditions in Spain, it was difficult to maintain that the possibility of events occurring as they actually did occur must have been present to the minds of the parties. However, admitting that on these questions of fact "other minds might take a different view" the judgment proceeds to deal with the argument of the owners, assuming that the happenings which had given rise to

[1] *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524.
[2] [1938] 3 All. E.R. 135.
[3] [1904] 1 K.B. 493.

this case had been contemplated by the parties. The argument would seem unanswerable if it was admitted that frustration can only take effect by means of the implication of a term into the contract. There would seem to be abundant authority for this theory as to the basis of the doctrine.[4] In spite of this authority, Goddard, J., expressed the opinion that the doctrine of frustration did not rest on implied terms but on the disappearance of the subject-matter of the contract, operating *ab extra*, without regard to the intention of the parties. "If the foundation of the contract goes, if something is swallowed up in an earthquake, it goes, whether or not the parties have made a provision for it."[5] The judgment relies on the authority of decisions, such as *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams*,[6] where charterparties had been held to be discharged by frustration when the ships chartered were requisitioned by the Admiralty although, since the charterparties had been entered into after the outbreak of the Great War, the possibility of requisition must have been contemplated by the parties as much as the possibility of seizure in the present case. Yet, however difficult it may appear to distinguish these wartime cases if attention is confined to the facts, the authority of these decisions is considerably impaired by the fact that nothing in the arguments or judgments in these cases indicates that the point at issue was ever considered. The decisions depended on the question whether in the circumstances requisition by the Admiralty constituted an event of sufficiently fundamental nature to effect frustration. These cases were, therefore, chiefly concerned with what has been referred to above as the objective requirements of frustration, with extension of the narrow category of circumstances which alone, until the outbreak of the War, were believed to justify application of the doctrines of frustration and impossibility of performance. Goddard, J., also relied on the dissenting judgment of Lord Haldane in *Tamplin* v. *Anglo-Mexican Petroleum Products Co. Ltd.*,[7] and on the fact that this judgment had been cited with approval in subsequent decisions. Here the same objection might be raised. Lord Haldane's judgment was not referred to on the question whether frustration could be invoked regardless of the intention of the parties but on the question whether certain happenings could lead to the application of the doctrine. This was the point in issue in the *Tamplin* case itself. Moreover, the judgment of Lord Loreburn in this case is perhaps the *locus classicus* for the theory which bases frustration upon the implication of a term into the contract. The difference of opinion between Lord Haldane and the majority arose merely over the question whether the interruption of the charter was sufficiently fundamental to justify the application of the doctrine of frustration. There is, therefore, little reason to believe that Lord Haldane's speech was directed to the problem for which it was relied on in *Tatem* v. *Gamboa*. The question whether a term could be implied dealing with a contingency contemplated by the parties was, however, raised in *Bank Line, Ltd.* v. *Capel*.[8] Nevertheless, this decision is clearly distinguishable from the present case. Here frustration would operate in spite of the presumed common intention of the parties—an agreement that

[4] Scrutton, *Charterparties* (1931), 13th ed., p. 116; Halsbury's *Laws of England*, 2nd ed., Vol. 7, p. 212.
[5] At p. 143.
[6] [1918] 1 K.B. 372.
[7] [1916] 2 A.C. 397.
[8] [1919] A.C. 435.

seizure should not discharge the contract being the inference which, as the owners alleged, had to be drawn from the fact that the possibility of seizure was in common contemplation. In *Bank Line, Ltd.* v. *Capel* the provisions of the contract were, however, not contradicted but only supplemented by the operation of frustration. That this supplementation of an incomplete provision in the contract was not conceived to be in conflict with the accepted foundation of the doctrine on an implied term appears from the judgment of Lord Sumner, where an exposition of the point in issue is preceded by a statement expressing unqualified acceptance of the implication-theory.[9]

This brief review of the authorities would show that the conclusion reached by Mr. Justice Goddard was not inevitable.[10] In view of this state of the authorities and in view of the general theoretical importance of the question it may not be irrelevant to consider it from the point of view of principle. A comparison with other legal systems shows that the association of the doctrine of frustration with the process of reading terms into the contract is not a necessary one, however universal the recognition of the effect of a fundamental change of circumstances. Even English law, as Professor Page has shown,[11] had developed at least the rudiments of an independent theory of impossibility of performance before the theory of the implied condition was introduced in *Taylor* v. *Caldwell*.[12] In the opinion of Professor Page this theory only serves as an *ex post facto* explanation of the decision reached. The decision, which must depend upon whether the event in question can be said to constitute impossibility of performance, is in addition made to depend on the unexpressed intention of the parties. This addition of a subjective to an objective criterion is not only capable of producing confusion, it provides also the potential instrument for arresting the development of the law. Professor Page points out that "the very courts that invoke the doctrine of the implied condition as a justification for treating the contract as discharged insist that it is impossible to imply further conditions for mutual restitution in case of supervening impossibility if the law does not recognise quasi-contractual rights arising out of such discharge."

But apart from the rule in *Chandler* v. *Webster* the fiction has so far actually assisted in the growth of the doctrine. Under the rule of *stare decisis* there was always a danger that the doctrine might be confined to one category of cases as, following *Taylor* v. *Caldwell*,[12] to cases of destruction of the subject-matter of the contract, or, following *Robinson* v. *Davison*,[13] to cases where personal services could not be performed by reason of the death or incapacitating illness of the promisor. The fiction of the implied term may well have served as protection against this latent

[9] At p. 455.

[10] Shortly after *Tatem* v. *Gamboa* the doctrine of frustration came up again for judicial consideration in *H*—— v. *H*——, [1938] 3 All E.R. 415. The decision that a separation agreement was not discharged by frustration as a result of the change of the law caused by the Matrimonial Causes Act, 1937, was expressed in a manner showing unreserved adherence to the old theory as to the foundation of frustration. "I find it impossible to say that there is any implied term in this contract that, if the law ten, twenty or thirty years later is changed in the sense in which it was changed in 1937, the whole contract was to be at an end." (p. 427.)

[11] "The Development of the Doctrine of Impossibility of Performance" (1920), 18 *Michigan Law Review* 589, also in *Select Readings on the Law of Contracts*, p. 979.

[12] (1863), 3 B. & S. 826.

[13] (1871), 6 Ex. 269.

danger. If *Taylor* v. *Caldwell* is explained, not on the ground of the destruction of the subject-matter of the contract, but of the implication of a clause, then, since a similar clause may be implied in other circumstances, it becomes possible to apply the doctrine of frustration to other types of cases.

Discharge by supervening impossibility of performance seems now so well established as a doctrine independent of its manifestations in specific circumstances that there would appear to be no more need to employ the fiction of the implied term as a safeguard of this independence. The use of fictions for the development of the law is a commonplace of English legal history. But the art of using fictions requires courage to abandon them as soon as they have served their purpose. According to *Tatem* v. *Gamboa* this moment has now arrived. In support one may refer to recent developments in the law of quasi-contract. The change introduced into the law of impossibility of performance is exactly the same as that effected by *Craven-Ellis* v. *Canons Ltd.*[14] and *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Bros.*[15] in the law of quasi-contract.[16] The fiction of a notional contract is being sacrificed to give place to the dictates of natural justice as represented by the doctrines of unjustified enrichment and impossibility of performance.[17] It may well be argued that the forces which have been working successfully in the field of quasi-contract against the ideas of freedom and sanctity of contract, which lie at the root of the fiction of contracts implied in law, should now be permitted to transform the doctrine of frustration. The extent of that transformation will appear from an attempt to sum up the result of *Tatem* v. *Gamboa* in terms of the law of evidence. Before this case it would still have been correct to assert the existence of a presumption against discharge by impossibility of performance, although this presumption had been considerably weakened by the greater ease with which terms providing for frustration could be implied, once the law began to consider the parties as reasonable men or "fair dealers" rather than as the "hard bargainers"[18] which in fact they might be. The presumption has been reversed by *Tatem* v. *Gamboa*. As a result of this decision nothing short of an express agreement providing against discharge will prevent the operation of the doctrine of frustration.

J. UNGER.

Abortion: Medical Aspects of Rex *v.* Bourne.

The case of *Rex* v. *Bourne*, so recently concluded, has been one of outstanding interest to the medical and legal professions, and has not been without its interest for the public in general. To consider its significance it is as well to review briefly the circumstances of the case.

Mr. Alec Bourne, a gynaecologist of the highest repute amongst his colleagues was asked to see a girl of fourteen who had become pregnant

[14] [1936] 2 K.B. 403. For comment see 1 *Mod. L.R.*, p. 76, and Friedmann, "The Principle of Unjust Enrichment in English Law," 16 *Can. Bar Rev.* 243 at p. 250.

[15] [1937] 1 K.B. 534. See Friedmann, *op. cit.*, at p. 251.

[16] A comprehensive survey of the present state of the controversy containing a full list of references, is given by Logan, "Restatement on Restitution," 2 *Mod. L.R.* 153.

[17] In *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497, 510 Lord Sumner described frustration as "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

[18] Lord Sumner in *Bank Line, Ltd.* v. *Capel, supra*, at p. 453.

as the result of having been raped by some soldiers in Whitehall. He wrote to the doctor who had asked him to see the case saying that he would be pleased to see the girl, take her into hospital and operate on her. Mr. Bourne explained in evidence that this did not mean that he would do any such thing until he had formed his own opinion after due observation. He pointed out that actually he did not operate on the girl until eight days after her admission to hospital during which time he had observed her closely and made various tests. He admitted that he approached the case with a bias towards operation because of his knowledge and experience of the harmful effects which child-bearing had in many such cases. He operated and terminated pregnancy under conditions which it is agreed were the safest possible.

Mr. Bourne had for some time realised that the doubt which in some cases amounted to fear, which existed in the minds of many of his colleagues as to what the law actually was in regard to therapeutic abortion, was hindering the conscientious and ethical application of medical practice in these cases and at the same time probably driving many to the abortion-monger. He himself felt quite convinced that where he was as certain as one can be in medicine that a pregnancy would be seriously damaging to the health, physical or mental, of the patient, Parliament in its wisdom, when framing the 1861 Act intended that he should be within the law in operating under safe conditions. He would have liked to use this case to clarify the position and demonstrate to his colleagues that his view was right. He was prevented from doing so, however, by the father of the girl who expressed the wish that the matter should be kept secret. Mr. Bourne fully observed this wish but the Police Authorities came to know of what was happening through the girl being required for evidence in another case.

In the trial Mr. Bourne, who pleaded Not Guilty, stated that he formed the opinion after careful observation that the continuance of the pregnancy would seriously damage—possibly irreparably damage—the girl's health and thus her life. Other eminent medical men testified that they agreed with Mr. Bourne's view as to the desirability of the operation being performed. Mr. Roland Oliver, K.C., who appeared together with Mr. Gerald Thesiger for Mr. Bourne, contended that what had been done had been lawful and proper from all aspects. He stated that it was unthinkable that the law should render it impossible for a doctor under such circumstances to do what was probably vital in order to preserve the health of the patient. The Attorney-General had stated that the operation was lawful if done to *save* life but not otherwise. Mr. Bourne was not going to pretend that he performed this operation to save life. He did it to save health and preserve life. At the earlier proceedings in the Police Court, Mr. Thesiger had very aptly pointed out that Mr. Bourne's action had simply been to remove the fruits of a horrible felony.

His Lordship, summing up, pointed out that the case differed materially from the usual run of abortion cases. He stated that in his opinion clearly the word "unlawful" had been deliberately inserted in the Act of 1861 and that it meant that there were occasions upon which an operation could legally be performed. Obviously, in his Lordships' opinion, it would be legal for a surgeon to operate for the purpose of saving the life of his patient. In His Lordship's opinion the criterion was that the operation must, if it were to be within the law, be to *preserve* the life of the patient. When His Lordship first used this word "preserve" some may have thought that he was taking the same view as the Attorney-General. Later, in his

summing up, he made it clear beyond all possible doubt that he differed in a very important respect and his words are for this reason extremely significant. His Lordship stated: "If the doctor is of opinion on reasonable grounds and on adequate knowledge that the continuance of pregnancy would probably make the woman a physical or mental wreck, the act is lawful." There can be no doubt that the jury in arriving at their verdict of "Not Guilty," were as much influenced by that statement as by any other point in the case. There are those who hoped for some sensational new aspect to be derived from this case. There are those also who feel that the law in its present state is unsatisfactory. For both of these groups of persons the case has meant no advance, but for the general body of the medical profession and for others interested, it has set an important and definitely valuable precedent.

His Lordship pointed out that each case must be decided on its own merits and he also re-affirmed that it was up to the Crown in any case to prove to the satisfaction of the jury "beyond reasonable doubt that the act was not done in good faith for the purpose only of preserving the life of the mother." The decision therefore should bring comfort to the mind of the practitioner who is confronted with a problem of terminating pregnancy to preserve the life of his patient. To preserve surely means to keep intact, to maintain in its proper state and to guard from such dangers as may beset it. What is the life of an individual either to herself or to the community if she is a permanent physical or mental wreck?

The medical practitioner is not concerned with what are sometimes called the humanitarian or possibly more accurately, the compassionate grounds for operation. He gets a very vivid picture in the course of his work of human nature and its fight against civilisation. He sees the picture as one of such a complicated pattern that he wisely confines himself to his vocation, namely, the care of the health of his patients, under the circumstances, fortunate or unfortunate, in which they find themselves thrust.

To the general practitioner then as well as to the specialist obstetrician and psychologist this case will have brought satisfaction born in the knowledge that if he considers the health of his patient is at stake then an operation is justified if it is reasonably certain that the operation will restore or preserve that health.

To those who have always felt that to tamper with this law would be dangerous and beset with difficulties, this case will have raised the conviction that the law can well be left alone. More and more is it evident that the Parliament of 1861 was a wise one. Clearly it intended that there should be lawful occasions for operation and in its wisdom it left the criteria for such legality to be decided by subsequent generations in accordance with the viewpoint then held and above all on the merits of each individual case in relation to scientific knowledge and practice at the time.

Besides its more obvious one, the case raises an aspect which will doubtless not be raised elsewhere. Mr. Bourne's defence was undertaken by the London and Counties Medical Protection Society of which he is a member. The cost of his defence was not insignificant and to an ordinary person of moderate means it would have meant many years of toil to make good. Yet Mr. Bourne left the Court without a stain upon his character. Why then should he be put to any expense? It may be said that a free defence would have been afforded to a person without means. That of course is so, but why should not a person in the Criminal Courts whose name is cleared be entitled to his costs just as much as a person in the Civil Courts is en-

titled to them? It will be stated that Mr. Bourne need not have employed leading counsel in his defence. Surely a person accused of such a charge should be entitled to legal representation of at least equal standing to that of those charging him and it will be remembered that in this case the prosecution was undertaken by no less a person than the Attorney-General who had associated with him two other members of the Bar. Is this an aspect in which our system of justice is hard on the innocent defendant?

R. W. DURAND.

Negligence at Pedestrians' Crossings.

Three recent decisions in connection with accidents at pedestrians' crossings have caused much comment among motorists, and are also of considerable interest to lawyers. Pedestrians' crossings were instituted some years ago, with the object of providing at reasonable intervals along the highways areas where pedestrians may cross in safety, and without having to pay undue attention to motor vehicle and other traffic. As Scott, L.J., said in *Bailey* v. *Geddes*, [1938] 1 K.B. 156 at 167, "it is of the very essence of the safety of our streets on the one hand, that the foot passenger public should cross the streets by the pedestrians' crossings and not at a place where there is no crossing; and on the other hand, that at the pedestrian crossings motor traffic should really recognise the overpowering obligation by the Pedestrians' Crossing Places (Traffic) Provisions' Regulations so to check their speed that they can, if necessary, stop." It would be going too far to read into this passage an inference that it is negligence for a pedestrian to cross a street otherwise than by such a crossing, but it clearly indicates that the learned judge appreciates and is anxious to enforce the policy of the administrative department which is responsible for the regulations in question. The working of the crossings system has, however, not been without difficulties; difficulties which have in practice been largely solved by a policy of give and take between pedestrians and motorists. The pedestrian will usually not commence to cross if a motor car is approaching near to the crossing, and there can be little doubt that many motorists have come to take advantage of this attitude on the part of pedestrians. *Bailey* v. *Geddes* (*supra*) has sharply recalled to them that they must not take too much for granted.

Before considering the quite simple facts of this case it is necessary to set out the actual words of the regulations issued by the Minister of Transport under section 18 of the Road Traffic Act, 1934, with the object of giving legislative effect to his policy. Those which are relevant are—

> "3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing."
>
> "4. The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriage way at such crossing, and every foot passenger shall have precedence over all vehicular traffic at such crossing."

In the instant case the plaintiff, a pedestrian, was crossing a wide street at a crossing and had almost got over when he was knocked down and injured by the defendant's motor car. At the time when he started to cross he could see approaching a tramcar and a lorry, and must have

appreciated that if there were any vehicle in the third line of traffic beyond the lorry he would be invisible to its driver. On these facts the trial judge held that he was guilty of contributory negligence and dismissed his claim.

The Court of Appeal, however, considered that if the circumstances indicated in the above regulations exist it is not possible for there to be contributory negligence. There is, of course, a good deal of authority to the effect that a person who is being sued for injuries arising from breach of a statutory duty may rely upon contributory negligence (cf. *Dew* v. *United British Steamship Co. Ltd.* (1928), 139 L.T. 628), and though it may be that this view will not appeal to the House of Lords (see e.g. per Lord Wright in *Flower* v. *Ebbw Vale Steel & Iron Co.*, [1936] A.C. 206, at 210) it must be taken as correct at the moment. The regulations here, however, give the pedestrian the statutory right to cross, and make it *ipso facto* negligence for a motor driver who cannot see when approaching a crossing that there is no pedestrian on it to proceed at any speed greater than that at which he can pull up before actually reaching it. This breach of absolute duty is of course quite different from a neglect to observe the Highway Code, though that document does in fact deal with the precautions to be observed at such crossings (see on these points, "Negligence in Running Down Cases," by E. Wyndham White: *Cambridge Law Journal*, Vol. VI, No. 3, p. 404). The result in this case is really the common sense one that a motorist whose view of a pedestrian crossing is obscured by other traffic must proceed on the assumption that some foot passenger may in fact be using it.

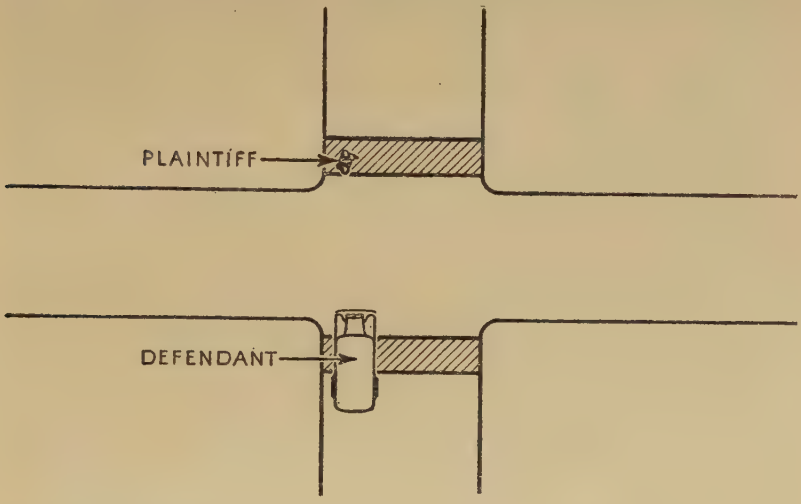
Bailey v. *Geddes* (*supra*) was, perhaps naturally, assumed to establish that any pedestrian injured on a crossing must have a right of action. *Knight* v. *Simpson*, [1938] 3 All E.R. 309, shows that this is not so. The motorist is only guilty of statutory negligence if he contravenes the regulations. Now it is a condition of his obligation to slow down that he should be able to see a foot passenger on the crossing when he approaches it. If the foot passenger steps on to the crossing after the motorist has reached it, or indeed when he is so close to it that he may from a common sense point of view be said to be no longer approaching it, he cannot claim, if injured, that there has been statutory negligence. This is what happened in the instant case. The plaintiff had been standing on the pavement, giving no indication of his intention to cross the street until he stepped out, more or less into the near wing of the defendant's car, at a time when it had been driven on to, or at any rate within a foot or two of the crossing. Wrottesley, J., held that the accident was due to the plaintiff's own negligence and dismissed the action.

Chisholm v. *London Passenger Transport Board*, [1938] 2 All E.R. 579, deals with the position at light-controlled crossings as to which there is a separate regulation, viz.—

> "5. The driver of every vehicle at or approaching a crossing at a road inter-section where traffic is for the time being controlled by a police constable or by light-signals, shall allow free and uninterrupted passage to every foot-passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing."

The case may be dealt with shortly, as though of great practical importance it has less legal interest. At road intersections there are usually two pedestrians' crossings, one before and the other after the intersection

of the incoming road, as the accompanying sketch will make clear. It appears that the plaintiff started to cross at the far crossing after the driver of the defendant's omnibus had received the signal to proceed, but while he was still approaching the second crossing. The plaintiff was knocked down and injured while still on the crossing. Hilbery, J., held that regulation 3 as applied by the Court of Appeal in *Bailey* v. *Geddes* (*supra*) applied and that the defendants were therefore liable for statutory negligence. Regulation 5 was not inconsistent with it, being intended to apply



only in respect of the pedestrians' crossing immediately in front of the driver when he received the release signal. It may be suggested that all three regulations, 3, 4, and 5, ought to be read together, when it would appear that on pedestrians' crossings situated at road intersections where there is control by the police or a light system, foot passengers are not given precedence, and that in these circumstances much of the force of the argument in *Bailey* v. *Geddes* (*supra*) as to the impossibility of contributory negligence is lost. Certainly from the point of view of maintaining traffic flow in the streets, and success in this must be a considerable factor of safety, it is very undesirable to encourage foot passengers to cross on pedestrian crossings at road intersections so to speak against the red lights, which the plaintiff in the instant case appears to have been doing.

R. S. T. C.

Hire-purchase: Right to Retake Possession

Judges often have to do violence to their consciences in applying the law to the harsh bargains made between vendors and purchasers under hire-purchase agreements. Thus in a recent case[1] Mackinnon, L.J., reluctantly concurred in invoking a legal technicality in favour of a company whose conduct he stigmatised as "roguish." Again, in *South Bedfordshire Electrical Finance Limited* v. *Bryant*,[2] the sympathies of the Court were with the "unfortunate defendant,"[3] although the regrets of Mackinnon,

[1] *Rentit Ltd.*, v. *Duffield*, [1937] 3 All E.R. 117.
[2] [1938] 3 All E.R. 580.
[3] *Per* Greer, L.J., at p. 581.

L.J., were tempered by reflection on the folly of the respondent in entering into the agreement in question.[4]

The agreement was for the purchase of a cold-room and was in a familiar form which provided *inter alia* that if the hirer should be in arrears with any payments due under the agreement or should allow any judgment against him to remain unsatisfied then it should be lawful for the company, without prejudice to its rights to recover arrears or damages, to terminate the hiring and retake possession of the chattel.

The respondent fell into arrears with his payments and the defendants brought an action to recover the instalments due; in this action they recovered judgment by default. As this judgment remained unsatisfied the appellant company took possession of most of the cold-room but were prevented from retaking all of it. The present action was brought to determine whether the appellants were entitled to retake the goods. It was ingeniously argued on behalf of the respondent that in the first action the appellants had in fact sued for the value of the chattel. They had sued for the balance and this with the amounts already paid was the value of the chattel. The effect of that judgment, it was argued, was to terminate the contract and to transfer the ownership of the chattel to the respondent. Having elected to treat the hirer as a buyer it was not open to the company to sue him for possession.[5] The Court of Appeal unanimously rejected this contention. The agreement, like the agreement in *Helby* v. *Matthews*,[6] was an agreement of hire with an option for the hirer to acquire the ownership of the chattel. The first action was not an action to recover the value of the chattel but merely an action for instalments due. This judgment being unsatisfied the clause in the agreement providing for the company's right to retake possession came into operation. *Brinsmead* v. *Harrison*[7] and *Re Ware, Ex parte Drake*[8] are authority for saying that judgment against a defendant in trover without satisfaction does not vest the property in the defendant. "The general observation there seems to be *a fortiori* applicable to a case where what is sought to be obtained is not the property in the goods as such but a mere claim for money due under the agreement.[9]

The Hire Purchase Act, 1938, affords a limited relief in cases of this kind. It is there provided (s. 11) that where goods have been let under a hire-purchase agreement and one-third of the purchase price has been paid or tendered, whether in pursuance of a judgment or otherwise, the owner may not enforce any right to recover possession save by action. The action must be commenced in the County Court for the district where the hirer resides or carries on business or where he resided and carried on business at the date when the last payment was made under the hire-purchase agreement (s. 12). Once the action has been commenced the owner must not take any steps to enforce any sums due under the hire-purchase agreement except by claiming the sum in the said action. The Court may make one of several orders: (*a*) it may make an order for specific delivery of all the goods to the owner; (*b*) it may postpone the operation of such order pending payment of the balance due; (*c*) it may

[4] At p. 584.
[5] *Bradley & Colin Ltd.* v. *Ramsay & Co.*, 106 L.T. 771.
[6] [1895] A.C. 471.
[7] L.R. 6 C.P. 584.
[8] 5 Ch.D. 866.
[9] [1938] 3 All E.R. 584.

order specific delivery of part of the goods to the owner and transfer to the hirer the owner's title to the remainder of the goods. The Court will not make an order vesting the owner's title in part of the goods in the hirer unless it is satisfied that the amount which the hirer has paid exceeds the price of the part to be vested by at least one-third of the unpaid balance of the hire-purchase price. Thus if the purchase price of the whole goods is $x + y$ and the hirer has paid x, and if the price of the part in respect of which the order is sought is p, then, as a minimum requirement the equation $x > p + \frac{y}{3}$ must be satisfied before any order will be made. This means, in effect, that the hirer will always be penalised for his failure to comply with the agreement.

S. 11, in so far as it relates to the recovery of possession of the goods after the date of commencement of the Act, 1st Jan., 1939, and s. 12, in so far as it applies to actions commenced thereafter, apply to all hire-purchase agreements whether made before or after that date (s. 20).

E. Wyndham White.

Obstruction in the highway—the dilemma principle

A recent case in the Irish Supreme Court affords a further illustration of the fact that there is within the systems derived from the Common Law abundant material for an Imperial Comparative Law. In *Kelliher* v. *Tipperary Board of Health & Leahy*, [1938] I.R. 43, the Irish Court applied and explained the headnote in *Butterfield* v. *Forrester*,[1] viz. that, "One who is injured by an obstruction in the highway against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction."

The driver of a motor vehicle by night struck the wall of a bridge and, on the facts, the Court held (by a majority) that his injury had been decisively caused by his contributory negligence. But the Court refused to accept the "drive within the radius of your lights" rule which the English Court of Appeal appeared to establish in *Tart* v. *Chitty*[2] and *Baker* v. *Longhurst*[3] and which has taken root in certain American jurisdictions.[4] Scrutton, L.J.'s dictum[5] that, "If a person rides in the dark, he must ride at such a pace that he can pull up within the limits of his vision, and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look-out," was not applied in *Tidy* v. *Battman*.[6] But *Tidy* v. *Battman*[6] was merely distinguished from the earlier cases on the facts; it did not purport to overrule those cases; it contained no attempt to explain the nature or extent of the limitations within which Scrutton, L.J.'s principle must operate.

The true limitation was first clearly stated in *Scott* v. *McIntosh*,[7] where

[1] 11 East 60.
[2] [1933] 2 K.B. 453.
[3] [1933] 2 K.B. 461.
[4] E.g. *Stone* v. *Mullen* (1926), 257 Mass. 344; but contrast *Morehouse* v. *City of Everett* (1926), 141 Wash. 399, where the Court refused to adopt the rule, on the following grounds: (*a*) that a driver may assume that the road is fit for travel and (*b*) that the adoption of the rule would encourage breaches of the law relating to the lighting of vehicles.
[5] In *Baker* v. *Longhurst* (*supra*) at p. 468.
[6] [1934] 1 K.B. 319.
[7] [1935] S.C. 199.

Lord Anderson said (at p. 204): "The suggested dilemma can only be put after it has been antecedently established that the unlighted obstacle was capable of being timeously seen by one keeping a proper look-out." This limitation takes cognisance of the fact that, in certain circumstances, it is a physical impossibility to detect certain objects against certain backgrounds and that this impossibility is entirely independent of the speed of the spectator's movements or indeed of whether he is moving at all.

The judgments in *Kelliher's Case* (*supra*) certainly support Lord Anderson's proposition; and, although *Scott* v. *McIntosh*[7] was not quoted therein, that of FitzGibbon, J., contains (at p. 63) an apt illustration of that proposition. After stating that, "there may be something in the nature of the obstruction itself which would justify a jury in absolving the driver of negligence or of contributory negligence as the case might be," the learned judge continues: "If the famous donkey of *Davies* v. *Mann*[8] had been lying in the middle of a dusty road at midnight it might well be that even powerful headlights would fail to distinguish it from its surroundings in time to allow a driver of a motor car to pull up and avoid it. In such a case, it would be necessary to draw an inference of fact that a reasonable driver could, or should, have seen the obstacle, and that the failure to do so was negligence."

It is to be noted that FitzGibbon, J.,'s claim (at p. 64) that it was the Irish Court (in the unreported case of *Kennelly* v. *Keane*) which first established that Scrutton, L.J.'s dilemma principle is not of universal application does not appear to be well-founded. *Kennelly* v. *Keane* was decided on 2nd July, 1935,[9] i.e. later than *Tidy* v. *Battman*[10] and *Waring* v. *Kenyon*[11] in England and *Scott* v. *McIntosh*[12] in Scotland.

[8] 10 M. & W. 546.
[9] For this information, I am indebted to the Assistant-Registrar of the Supreme Court of Ireland.
[10] [1934] 1 K.B. 319 (10th Oct., 1933).
[11] 79 S.J. 306 (20th March, 1935).
[12] [1935] S.C. 199 (19th Dec., 1934).

J. A. Coutts.

REVIEWS

A HISTORY OF ENGLISH LAW. By Sir William Holdsworth, K.C., D.C.L., LL.D. Volume XII. London: Methuen & Co. Ltd., 1938. Pp. xxxviii + 784. **32s. 6d.**

In this and the two preceding volumes of his great work Sir William Holdsworth presents us with the "first complete legal history of the eighteenth century that has ever been written." The tenth and eleventh volumes deal with the century in relation to public law and enacted law respectively. In the twelfth and latest, but, as the author gives us good reason to hope, not the last, instalment of his history he deals with what he describes as the professional development of law in the eighteenth century. Under this description he includes not merely the development of the profession of the law but also the development of the law by the legal profession, judges, writers, teachers and practitioners.

The task of reviewing such a vast compendium of varied information as this volume contains might well daunt the most hardened critic; to perform it adequately would require on his part knowledge as extensive as that of the author and there is no one who possesses this qualification. But if one is incompetent to criticise, one may at least describe and appraise the author's achievement. Works of learning are commonly judged by their matter, their method and their style. Of the matter of this volume it may be said at once that nowhere else is there to be found such a mine of knowledge; of its method, that it is well arranged and analytically exhaustive; and of its style—well, as Viscount Stair said: "A quaint and gliding style, much less the flourishes of eloquence, the ordinary condiment and varnish which qualify the pains of reading, could not justly be expected in a treatise of law which of all subjects doth require the most plain and accurate expressions"—and Professor Holdsworth's manner of writing has all the merits of clearness and precision appropriate to his subject. He has provided the material of which others less industrious than himself will doubtless avail themselves hereafter to generalise more brilliantly and less accurately.

The hundred pages devoted to the history of the various branches of the legal profession throughout the century afford an admirable summary of an interesting period in which many archaic features were discarded and the profession as we now know it began to emerge. Much that is picturesque was in process of disappearing, but the ceremonial of calling to the bar at Lincoln's Inn in the eighteenth century still required a gentleman on his admission to provide each Master of the Bench with "a service of sweetmeats value 5s. and a bottle of wine." The evolution of the modern Law Society from the friendly and convivial meetings of the members of the delightfully named "Society of Gentlemen Practisers in the Courts of Law and Equity" is typically English.

The blot on the century's legal history is undoubtedly the lamentable decadence of legal education which it exhibited. The standard of teaching at Oxford University was "at a low ebb"; in the Inns of Court teaching had "wholly disappeared." But happily the eighteenth century was also the century of Mansfield and Blackstone and thanks to them the darkest hour became the precursor of a new dawn, though even yet we have not reached full daylight.

The account of the technical apparatus of the law in reports, abridgments, etc., and of the literature of the law is encyclopaedic and perhaps

more useful for reference than attractive to read. But the brief biographies of the judicial figures of the century are excellent reading, enlivened as they are with piquant quotations. And their respective contributions to the development of particular doctrines of the law are most interestingly described. Buller, Mansfield's colleague and admirer, whose "idea of heaven was to sit at *nisi prius* all day and play at whist all night"; Kenyon, of whom Ellenborough said that "no man ever hit so often who always shot flying"; Eardley Wilmot who thought that the strictness of the doctrine of consideration "has been melting down into common sense of late times"—of these and the many other striking legal characters of the century we have vivid and clear-cut vignettes. The occasional asides in which the author indulges make one wish that he had more frequently discarded his reserve, as when he remarks in passing that "the greater elaboration of modern revenue statutes generally makes it unnecessary to discuss principles and confines the Court to guessing the meaning of the obscure phraseology in which these statutes are expressed."

But the heroes of this volume are, beyond comparison, Mansfield and Blackstone. Many tributes have been paid to Lord Mansfield and many criticisms have been levelled at him. Here we have marshalled the material for judgment and few will be disposed to challenge Professor Holdsworth's verdict that Mansfield "created and settled many of the basic principles and rules of our modern law." The explanation of Mansfield's greatness he finds in the width and catholicity of his scholarship. "It was because Mansfield was learned in other systems of law besides the common law that he was able by his decisions to develop and modernize many of the rules and principles of the common law." The present reviewer may be pardoned for noting with gratification the important part which Professor Holdsworth assigns to Mansfield's knowledge of Scots law in his intellectual equipment. To this was due his preference for principle over precedent—"he considered that attention should be paid not so much to the actual decision in any given case, as to the principle underlying that decision"—and it was this no doubt also which in his famous attempt to assimilate the systems of equity and common law led him astray and brought down on his head the vials of orthodox wrath. The event has proved that when he was wrong he was generally wrong only in being in advance of his time. The views recently expressed by Lord Wright (to whom this volume is inscribed) on the doctrine of consideration would perhaps in turn have startled Mansfield!

The pages devoted to the life and work of Blackstone display a loyal championship of the author's great predecessor in the Vinerian professorship, but they do more than discharge a duty of piety for they bring before the reader an excellent picture of the man and a balanced estimate of the value of his work. Order and system are selected as the leading characteristics of his mind and his much lauded literary style is shown to be the reflection of these attributes. No one in future should set about reading the *Commentaries* without first reading the last thirty-five pages of this volume.

To have written this volume alone would have been a sufficiently admirable achievement of scholarship, but it is one of twelve volumes and we are happily promised more to come. Before such prodigality of learning the reviewer can only stand amazed.

MACMILLAN.

THE FOLKLORE OF CAPITALISM. By THURMAN W. ARNOLD. Yale University Press; Oxford University Press. Pp. 400. **$3.**

This book has had an enormous and widespread success in the United States, as is evidenced by the notices in the popular and literary journals and by the leading reviews in scientific periodicals. It has been hailed as the most important work since the *Origin of Species* and in its own field as the greatest contribution to political thinking since Marx. It has been described as one of the most realistic and constructively critical books on government and law to appear in our generation, and it has been praised for its stimulating, refreshing and encouraging qualities, and for its pitiless honesty and pitiless humanity. On the other hand it has been regarded as an elaborate leg-pull, denounced as a sedulous disparagement of the function of intelligence as addressed to long-range problems and values, and summed up as a devastatingly useful handbook for fascists.

The thesis of the book is simple. Human needs are met by organisations and the sole test of these organisations is their success in meeting those needs. But mankind, especially the intellectual section of it, must associate its organisations with ideals and principles and whenever difficulties arise—and they are bound to arise in the process of social change—reference is always made to the original ideals and principles supposedly at the foundation of our institutions. Now these ideals and principles are, in the author's view, nothing but creeds, and like all creeds a compound of myths, taboos and conventions operating in an atmosphere of ritual and revelation. Perhaps the current term ideology exactly expresses his idea. Professor Arnold is not angry about this and he pretends not to be cynical about it. On the contrary he wishes us to study our institutions from this standpoint and to conduct the study with the objectivity of anthropologists. To refer all the problems produced by the contemporary breakdown of capitalism to so-called fundamental principles such as private enterprise or freedom of contract and to insist continually on the rational, logical application of these principles is in his view a futile proceeding, and in his witty incisive way he makes it look both futile and farcical. Capitalism is a form of organisation, and like all forms of organisation it had its creed which acted as a unifying force, a set of attitudes which made the creed effective by giving prestige to those who conformed, a set of institutional habits which made men co-operate automatically and above all a mythological and historical tradition which made the creed almost divine. Its folklore was expressed principally in its literature of law and economics, which represented its slogans as truths and not merely tools. In its creed there was very little place for government, and now that capitalism is failing to meet new social needs and demands and the government is compelled to fill the breach, a grand dog-fight is raging between the supporters of the old organisation and the advocates of the new. This combat inevitably revolves around ideals and principles, but it will only be settled when people are persuaded that the new organisation can deliver the goods, which will mean that a new set of myths, taboos and shibboleths will have become established.

In his analysis of the functioning of capitalism Professor Arnold devotes considerable attention to the business corporation, since that institution serves admirably to illustrate his thesis. The folklore of early capitalism was woven round the small trader, and the prevailing ideal was that of the freedom and dignity of the individual engaged in the accumulation of wealth. When as a result of mechanical techniques the business

corporation evolved and grew into the giant concerns of to-day the folklore carried over. The law, i.e. the Supreme Court, dressed huge corporations in the clothes of simple farmers or merchants and thus made attempts to regulate them appear as attacks on liberty and the home. Nothing, Professor Arnold insists, could stop the progress of these organisations and they created the greatest productive machine that the world has ever known. But the personification of the corporation in law and economics led to the growth of uncontrolled monopoly and oligarchy, a development which was actually fostered by the anti-trust crusade. Now that this industrial feudalism has broken down, and the State has to deal with the wreckage, the ancient folklore is still a powerful obstacle to the emergence of the necessary new organisation. The best way at the moment for a government to assume a new activity is to go through the solemn procedure of setting up an organisation which looks like an autonomous business corporation, whereupon it escapes all the ideals and principles which hamper the action of a government department. On all this the author is brilliant and his chapters on the Ritual of Corporate Reorganisation and Taxation by Private Organisation are gems.

It is fascinating to translate Professor Arnold's thesis to the English scene. At a certain period in the nineteenth century the amounts accruing to the Exchequer from direct and from indirect taxation happened to be nearly equal. After a few years this accident began to look like a practice and gradually it acquired the force of a rule. From this it became elevated to a principle and thence it rose almost to the level of a divine law. As late as the nineteen-twenties survivors of the Victorian age were solemnly denouncing the violation of the sacred principle by which direct and indirect taxation stood in the relation of fifty-fifty. One serious proposal for restoring the ratio was to halve the national expenditure overnight. The statesmen in power at the time, however, were obsessed with another piece of folklore, namely, the maintenance of the Sinking Fund. With the unemployment total well over a million, Chancellors and ex-Chancellors of the Exchequer engaged in the mutual recrimination of "Yah, who raided the sinking fund?" To-day not only is the sinking fund sunk but an attempt to balance the budget would cause a panic in the City.

There is an insistent popular demand in this country for light entertainment on the radio on Sundays, but this demand comes up against the principle of Sabbath observance. According to Professor Arnold in such circumstances "bootleg" organisations spring up to satisfy the demand, and we find them therefore in the form of sponsored programmes from the Continent. But this in turn violates the sacred principle by which the only sound medium of advertising is the Press. A possible solution was a threat to France that we would no longer support her foreign policy unless she shut down Radio Normandie, but the situation was met by a slight modification of the B.B.C.'s programme. This provoked an outcry against jazz on Sundays whereupon the public relations department explained that if the music had been played on Saturday night by Jack So-and-so it would have been jazz but played at a different tempo on Sunday by Charlie So-and-so it was not jazz. Here obviously we have the sort of issue which carries through to the High or Supreme Court. Do not affect a superior smile, Professor Arnold would say, this is the way things work.

G. L. Schwartz.

TOWARDS INDUSTRIAL PEACE IN AUSTRALIA. By Orwell De R. Foenander. Melbourne University Press. 1937. xxvii and 292 pp. **21s.**

Mr. Foenander has written a fine book on a fine subject. A fine subject because it is essential in these days that democracies should be aware of their resources of strength and growth. Such an awareness is important both positively and negatively. Positively so that they shall not assume that social control through democratic machinery has exhausted its potentialities, but on the contrary, that it is readily adaptable to the needs of the modern complex economically organised society. Negatively so that in those states where the democratic machinery has failed to respond to crying needs, the failure be laid at the right door, that is not to the inherent vice of democratic machinery, but to the short vision or selfishness of those who for the moment operate it.

From 1891 onwards the project of a system of compulsory settlement of industrial disputes was a matter of practical politics in the Australian democracy. The Commonwealth of Australia Constitution Act, 1900, s. 51, enabled the Federal Legislature to lay the basis of the present day system in the Commonwealth Conciliation and Arbitration Act of 1903. The significance of this date is too often overlooked. Four years before the Second Hague Peace Conference, eleven years before the outbreak of the Great War, seventeen years before the first Conference of the International Labour Office, eighteen years before the advent of Italian Fascism, thirty years before that of German National Socialism, a tribunal was set up and began to function in Australia, with powers in the last resort of making a binding award in a wide range of industrial disputes. Incidentally recognition was given to the role of employers' and employees' organisations in the control of economic organisation: and their responsibility to the community was embodied in a prohibition of strikes and lockouts.

The scheme which has been in operation ever since, though frequently amended, has been held in by two factors. In the first place, the Federal Parliament being a Parliament of limited powers can legislate in these matters only within the scope of s. 51, namely, for "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state." There flowed from this two grave disabilities. First, was the disability to make a common rule applicable to the whole of an industry, since the power to make such a common rule would be in effect delegated legislative power and not merely a power of conciliation and arbitration of disputes. S. 38 (f) of the Commonwealth Conciliation and Arbitration Act, 1904–10, purporting to authorise the making of a common rule was therefore held unconstitutional.[1] The author discusses with great acumen (pp. 203–31) the legal, economic and social implications of this holding, as well as the later decisions which have modified its drastic operation, by recognising that a dispute between an employers' and an employees' union may relate to the conditions of work of non-union labour, and to that extent subject the rights of persons not before the court to its arbitral power. Second was the unsatisfactory division of the power of industrial arbitration between the Federal Government where the dispute extended beyond the limits of one state, and all the rest which remains with the individual states. The problem of delimitation thus created has a similar insolubility in modern economic conditions to that of defining "inter-state commerce" under the Constitution of the

[1] *Employees' Fed.* v. *Whybrow & Co.* (1911), 11 C.C.R. 311.

United States, and the oscillation of decisions has contributed to the chaos of jurisprudence as to the common rule.

The second factor which has tended to restrain development is more basic, since it is not purely legal. Since the Statute of Westminster, if the Commonwealth and the States wished to assume the legislative power there given, constitutional legal difficulties would vanish. Such a *desideratum* is, however, not readily attainable, first, because of the jealousy in general between state and federal power, which led to an express reservation in the Statute of Westminster of the present system of distribution of powers between states and Commonwealth; and secondly, because the political and economic implications of the powers of industrial regulation are so grave. This latter has led to a series of amendments of the federal acts regulating the Commonwealth industrial power, which have swung between extension or restriction as electoral fortunes have dictated (pp. 14–65).

The very gravity of these obstacles sets in relief the remarkable record of effective social control of economic organisation which is to be seen in the thirty-odd years of the court's work. The author surveys this record under three main heads, wage fixation (pp. 69–122), standard hours (pp. 123-169), and preference to non-unionists (pp. 170–185). Under all these heads what is most striking is the courage with which the labour judiciary have approached the task of adjudicating not merely upon "rights" arising out of legislation or collective contracts, but upon the conflicting interests of the two sides to the controversy, as well as the social and economic claims of the community as a whole. For, while there are at present in the world twenty-three countries with machinery for settling industrial disputes as to "rights," Australia is one of the very few which have acted on the recognition that conflicts as to "interests" may be even more bitter and of more concern to the state. Moreover, the Commonwealth system has a further claim to notice—its judges are not representatives of employers and employees with a neutral chairman, but judges in the true sense. For this reason it is a pity that Mr. Foenander does not add some biographical material on the various judges whose work he so acutely analyses.

To these claims of Mr. Foenander's work upon the reader's attention there must be added a claim of a more purely legal nature. Again and again the reader familiar with American constitutional and legal problems will be struck by parallels. That with the American concept of "inter-state commerce" has already been noted. Of equal interest is the chapter (pp. 232–249) on the labour injunction as an instrument of control in industrial disputes. The final refusal of the Australian courts to follow the American line of evolution, and their preference for keeping the injunction within its traditional English scope, would repay a more intimate inquiry than the author is able to give. If it were argued that the existence of the Commonwealth system of arbitration were decisive, the further inquiry would be invited why in this country without such a system the more flagrant abuses of the labour injunction have not arisen. Of equal interest is the parallel drawn by the author (pp. 220–223) between the attitude to *stare decisis* of the Australian High Court in constitutional questions arising out of the system of industrial arbitration, with that of the United States Supreme Court in constitutional questions generally. A further parallel might have been drawn with the jurisprudence of the Privy Council in constitutional interpretation, particularly with regard to Canada.

These aspects are, however, but incidental to the main interest of the

study, which surely lies in its demonstration that conflicting economic interests can be brought within the sphere of social control without the suppression of free association, and the virtual destruction of the bargaining power of the workers which typifies the much-vaunted totalitarian industrial methods. The lesson emerges clearly from a work which both in substance and in form meets all the standards of scholarship. It is one which in this country has not yet been learned, for England is still among the states which have not established industrial courts with powers of compulsory decision.[2]

JULIUS STONE.

JUSTICE IN ENGLAND. By a BARRISTER, pp. 288 (1938). London: Victor Gollancz, Ltd. **7s. 6d.** net.

This is one of the volumes published under the auspices of the Left Book Club, and it betrays a bias in favour of a somewhat extreme left wing point of view. The anonymous author's attitude is coloured by a Marxian interpretation of history, and he shows an evident suspicion of the good faith of the bourgeois classes in whose hands the administration of justice in this country largely rests. Many of his strictures will appear to be well founded even to those who do not look at the matter from a political point of view, but the general outlook will no doubt be repellent to the average reader. This is a pity because putting the bias on one side the book gives one of the clearest and best balanced accounts of the actual machinery of justice and of its working which has so far appeared. The author has obviously been in personal contact with most of the institutions which he describes. He also has considerable powers of lucid exposition. In those chapters where the political outlook comes least into play such as that on the Procedure of the Courts this results in a really admirable description of a very complicated piece of machinery. Subject to what has before been said we can strongly recommend the book to anyone who wishes to obtain a bird's-eye view of the administration of the law in England.

We do not propose to discuss the many interesting and provocative points made by the author—this would take an article—but simply to indicate the main topics with which he deals. The first chapter is concerned with the personnel of the judiciary; judges and magistrates. It is rather overweighted by a long and largely verbatim report of the famous tiff between Lords Hewart and Sankey over the composition of the Court of Appeal. Much of the criticism in this chapter is certainly deserved. The short chapter on juries is rather too hostile to that institution, which has many good points. The description of the organization of the legal profession is good and refreshing. The chapter called "A Glimpse of the Law" could hardly have been satisfactory on such a short scale; being concerned with substantive law it is really outside the scope of the volume. The long chapter on the Procedure of the Courts has already been referred to: it is one of the best. "Equality before the Law" is naturally highly critical, but justifiably so. Those on "Legal Aid for the Poor Litigant" and "The Defence of Poor Persons on Criminal Charges" give the best short account of this comparatively new machinery that we have seen. They show that it has proved useful, but that, especially in the latter case, much too little

[2] For a survey of the machinery in the various states where compulsory peaceful settlement of industrial disputes is in operation see *International Labour Office, Labour Courts*, P. S. King & Son, 1938. For those states, of which this country is one, which have machinery without compulsory power, see *id., Conciliation and Arbitration in Industrial Disputes.*

use has been made of the existing facilities. The need for a Ministry of Justice becomes very evident in this part of the volume. "Political Aspects of the Law" is largely concerned with the question of Civil Liberty. Many who do not share the author's political views will regard with much the same misgivings the recent tendencies of the law in this field.

R. S. T. CHORLEY.

THE NEW CONSTITUTION OF INDIA. By G. N. JOSHI, M.A., LL.B., Professor of Constitutional Law, Government Law College, Bombay. London: Macmillan, 1937. xxix and 464 pp. **7s. 6d.**

Among the numerous books on the Government of India Act, 1935, so far published, this is one of the best, and certainly is the best for students. In the main it is objectively written. The author is not without his bias, but no book on constitutional law ever has been written or could be written without such bias—even the "good lawyer" who summarises his statutes betrays his bias by the scope of his summaries. Books on this particular subject, especially if written in India, are apt to be either political pamphlets or arid summaries with a little jejune political theory thrown in. Mr. Joshi has read widely and has a sufficient breadth of vision. He is, moreover, obstructed by none of the complexes with which the common lawyers have inflicted most constitutional lawyers because of their assumption that there is something called "pure law" and something called political science, which is quite different. A constitution depends essentially on its atmosphere, and Mr. Joshi gives the reader enough of this atmosphere to make the subject intelligible. This is particularly true of the three historical chapters with which the book opens. The discussion of the theory of federalism in Chapter IV is not, I think, so good; but it is at least welcome to find someone writing intelligently on this subject. Each of the main branches of the Constitution is then taken in turn, and is usually preceded by a short historical account. In the Appendices are the relevant documents—the Letters Patent constituting the office of Governor-General, Lord Linlithgow's Commission and Instructions, the Letters Patent constituting the office of Governor of Bombay, and the Governor's Instructions. The composition of the federal legislature, so far as the British India representatives are concerned, is set out in Appendix B, which therefore looks like a series of statistical tables. Appendix C contains the Second Schedule to the Act, and Appendix E the lists of legislative powers. Appendix D sets out the composition of the Provincial legislatures, and Appendix F the Draft Instrument of Accession.

W. IVOR JENNINGS.

PRINCIPLES OF CONTRACT. By SIR FREDERICK POLLOCK. Tenth Edition (1936). Pp. 762. Price **30s.** Stevens & Sons, London.

Little need be said on the appearance of the tenth edition of this famous work except to lament the fact that it will be the last revision undertaken by the master hand of the author himself.

All those who have studied some previous edition will have enjoyed its profundity of analysis, brilliance of exposition, and lucidity of style. But by far the author's greatest achievement is the clear demonstration that the law of Contract as we know it is not a tight scheme deduced by inexorable logic from rigid principles. The common law has been developed in no small measure by the sanctification of ancient fallacies. Williston has shown that false logic and inapposite precedents have at some stage

or another infected most doctrines of the law of Contract. It would be an incredible accident if the result of so haphazard a process were a neatly balanced and sweetly reasonable scheme. Other authors strive to inspire in the reader the delusion that such a result has been attained. Pollock rejects this doctrinaire treatment from the outset. On the first page he attacks the superstition of consensus *ad idem*. This aspect of the subject requires further elaboration, for even to-day there are many who consider it heresy to question the theory that contractual liability is securely founded in the free consent of the parties. Grossly unequal bargaining power and ever-encroaching legislative restriction have reduced the concept of freedom of contract to a sanctimonious fiction. It is an anachronistic survival of those dear dead days beyond recall, the days of *laissez-faire*, in which already Byles, J., had stigmatized the dogma as a myth. But even if one is content in some cases to accept the formal appearance of consent as true consent, there are other cases in which it is quite impossible to find that "the two minds were at one, at the same moment of time." Where is that moment in *Byrne* v. *Van Tienhoven* or *Stevenson* v. *Maclean* or *Howatson* v. *Webb*? The truth is that for long subjective conceptions of consent and intention have been gradually superseded by objectivised tests. This movement is visible in most branches of the law of Contract. Consent itself is losing ground to the protection of reasonable expectations as the basis of Contract—that this is the essence of contract is implicit in such cases as *Frost* v. *Knight*, *Burchell* v. *Gowrie*, *Ertel Bieber* v. *Rio Tinto*. Only ultra-conservatism or ignorance could induce a lawyer to assert with complete confidence that intention is the test of discharge by impossibility or breach in the face of such decisions as *Tatem* v. *Gamboa* and *Maple Flock* v. *Universal Furniture Products*. If Lord Atkin in *Bell* v. *Lever Bros.* is right, there is no doctrine of mistake based on subjective assumptions; mistake is merely an aspect of impossibility (see Lawson, 52 L.Q.R. 79).

It requires no brilliance of insight to recognise that change is creeping through the law of Contract. The issue is between the realisation of intentions and the protection of reasonable expectations, but this contest is not a new phenomenon. It can be seen in the judgment of Vaughan Williams, L.J. (in *Krell* v. *Henry*), who was able to decide that the contract was discharged because of both the foreseeability and unforeseeability of the supervening change. It can be seen in the conflicting views of Lord Selborne and Lord Blackburn in *Mersey Steel & Iron Co.* v. *Naylor*. It explains the divergent decisions in *British Waggon Co.* v. *Lea* and *Robson & Sharpe* v. *Drummond*. But citations can be multiplied indefinitely, and if the struggle is an old phenomenon the contemporary victory of objective tests is a new one. Any book on Contract which fails to give it due prominence misses the significance of the modern law. It is the strength of this book that it hints at the change; its weakness is the failure to develop consistently the implications of this transformation.

If this be the major criticism, there is a minor one in the inexplicable omission of relevant authority. On the certainty of terms no mention is made of *Foley* v. *Classique Coaches*, *Hillas* v. *Arcos* and *May & Butcher* v. *The King*. In connection with *Faulkner* v. *Lowe* there is no reference to ss. 72 (3), and 82 of the Law of Property Act, 1925. Most surprising of all is the total disregard of *Boone* v. *Eyre* and the fleeting reference to the notes to *Pordage* v. *Cole* in Williams' Saunders on the subject of discharge by breach.

J. GOLD.

PRINCIPLES OF MERCANTILE LAW. By J. CHARLESWORTH, LL.D., 4th ed. 1938, Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd., xxxix and 386 pp. **8s. 6d.** net.

The learned author is to be congratulated on the fact that a new edition has become necessary after the short interval of four years. Apparently the plan of the book has proved satisfactory, for there are no major changes. Modern legislation and recent cases have been inserted at the appropriate places. The book stands out for its concise style. However, as happens so often, economy of words may tend to give rise to inaccurate conceptions in the mind of the uninitiated. For example, the list of contracts *uberrimae fidei* (p. 47) omits any reference to the doubts which are commonly mentioned about some of the contracts, the nature of the *del credere* agent's liability would appear to be much less certain than stated on p. 115, and it may be doubted whether the freshman will be able to arrive at a proper understanding of commercial frustration when reading the paragraph on p. 81, or whether the law of marine insurance will be readily grasped by him when studying what is after all but a summary of the words of the Act.

It would seem that the book cannot really be intended for the student seeking a guide through the law. Otherwise one would have expected a little more explanation of the rules from a business point of view. Nor does this volume appear to be written as a text-book for the advanced student who requires rather a discussion of controversial points than an abstract of hard and fast rules which rarely appear in practice in this simplicity. The lack of vividness and scholarly treatment of the subject is, however, so common among legal text-book writers that it seems hardly fair to remark on those characteristics when reviewing one isolated instance. Still there remains one purpose for which the book is admirably suited, that is the revision during the anxious period immediately preceding an examination.

O. PRAUSNITZ.

THE LAW AFFECTING POLICE AND PUBLIC. By GERALD ABRAHAMS, B.A., *Barrister-at-Law*. London: Sweet & Maxwell, 1938. 186 pp. **15s.**

The author of this work boldly ventures into what he calls "the obscure realms that lie around the law, in particular those that separate legal from political theory." These are realms where lawyers generally fear to tread, and Mr. Abrahams might have done well to follow the example of his predecessors, for his excursions into political and philosophical theory tend only to complicate, and not to elucidate, his statement of the law. For example, in his chapter on the Liberty of the Subject (on page 56), he refers to "a liberty which is the transcendental implicate of consent at the level of consciousness." Mr. Abrahams expresses the hope in his preface that the book may be useful to policemen, but his assumption that most policemen have studied Kant appears to be unjustifiable.

Perhaps the most satisfactory chapter is that entitled "The Arm of the Law," which is devoted to a short history of the policeman's office, and a statement of his present status and powers. A consideration of the relevant cases leads the author to the conclusion that a policeman acting in discharge of his duty is not acting as the servant of the local authority which appoints and pays him, and consequently that the local authority

is not liable in damages for wrongs which the policeman commits: only the policeman himself, and any superior officer who directly instructs the wrongful act, are liable. This conclusion, which Mr. Abrahams reaches with some hesitation on the English authorities, might have been fortified by a reference to the Scottish cases on the subject.

The epilogue expresses the widely held view that modern legislation tends to interfere unduly with individual liberty. Particular reference is made to the Incitement to Disaffection Act, which extends the use of search warrants, and to the Official Secrets Act, 1911, which throws upon a person accused of obtaining an unauthorised plan or document the onus of proving that he has not done so for a purpose prejudicial to the interests of the State. It also contains severe criticism of magistrates in their administration of the criminal law. No doubt much of this criticism is well-founded, though the remedy which the author appears to favour—namely, the transfer of the bulk of criminal work to High Court Judges—hardly seems a practical one.

The book is blemished by some remarkable lapses of grammar, for instance on pp. 48 and 146.

W. I. R. Fraser.

GIBSON'S CONVEYANCING. Fifteenth Edition, by Arthur Weldon, H. Gibson Rivington, M.A., and J. F. R. Burnett. The Law Notes Lending Library, Ltd. 1938. cvii and 766 pp. **£2.**

Previous editions of this book have been well-known to generations of law students. A new edition has now appeared in the familiar green binding, but better printed than has been the case with some former editions. This improvement is by no means unimportant, since clear and attractive printing is of greater aid to the student than many law publishers seem to realise.

The book has no particular pretensions to literary elegance; it sets out to give an accurate and clear statement of all that the student requires for the various academic and professional examinations in Conveyancing, with particular reference to the Solicitors' Final, Pass and Honours, Examinations. Like all the works of these learned authors, it succeeds admirably in stating an immense amount of law concisely and in a readable manner—indeed, it states so much that as the standard textbook for most university examinations it has generally been superseded by shorter works. For the Solicitors' examinations, however, it is still indispensable.

The new edition contains no fundamental changes. It still deals primarily with conveyancing of unregistered land, the treatment of registered land being relegated to 65 pages at the end. It is suggested that this by no means reflects the comparative importance of registered and unregistered conveyancing at the present time, but no doubt the learned editors would justify themselves by pointing out that it does represent the comparative importance placed upon each of these branches by the papers in the Solicitors' examinations. In reply it may be suggested that it should be the function of a textbook such as this not merely to enable the reader to pass his examinations but also to qualify him to practise the subject, and further that the nature of examination papers is largely influenced by the nature of the existing textbooks so that the learned authors might help to reform the examinations by reforming their book. This statement must not, however, be taken to suggest that the book is merely a "cram-book." It is far more than that: any student that has

mastered its contents may be trusted as a more than adequate conveyancer so far as unregistered land is concerned, and as such he will no doubt continue to make good use of this book long after his student days are over.

The new edition incorporates the effect on conveyancing of the Tithe Act, 1936, and of the many cases decided since the former edition. The editing has been thorough and accurate, but greater emphasis might have been laid on the important and surprising decision of Bennett, J., in *Re Duce and Boot's Contract*, (1937), 53 T.L.R. 1000. The statement at pp. 159 and 160 of the relation between the rule in *Wheeldon* v. *Burrows* and s. 62 of the Law of Property Act, 1925, is not entirely clear, nor, it is thought, entirely accurate; surely the true position is that the contract for sale interpreted in the light of *Wheeldon* v. *Burrows* determines what quasi-easements the purchaser is entitled to, while under s. 62 *all* quasi-easements automatically pass to him unless expressly excluded in the conveyance either as originally executed or as subsequently rectified to give effect to the contract so interpreted. The index might also be improved.

These, however, are but minor criticisms of a good book, well re-edited.

L. C. B. GOWER.

RENT AND MORTGAGE INTEREST RESTRICTIONS. Seventeenth Edition, by the Editors of *Law Notes*. Law Notes Publishing Offices, 1938. xxiv and 334 pp. **10s. 6d.** net.

A new edition of this extremely useful book has been rendered necessary by the passing of the Rent Act, 1938 (noted at p. 162 of the preceding number of this Review). It contains an introductory sketch of the various Rent Acts followed by the text of each of these copiously annotated. The book can be heartily recommended as an accurate and clear guide to all practitioners who have to find their way through the maze of statutory provisions and the cases which purport to interpret but seldom clarify them. The publishers are to be congratulated upon producing such a well-bound and clearly printed volume at such a reasonable price. But unfortunately the book bears signs of hasty proof reading, the index being poor, and certain of the cross-references in the text inaccurate. These are serious blemishes which greatly diminish the utility of a book of this nature.

L. C. B. G.

CASES ILLUSTRATING GENERAL PRINCIPLES OF THE LAW OF CONTRACT. Second Edition. By SIR JOHN C. MILES and J. L. BRIERLY. Oxford: Clarendon Press, 1937. **21s.** net.

This is a new edition of the companion volume to Anson's *Contract*, and it contains some important new cases.